CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
The State of Missouri
AT THE
OCTOBER TERM, 1881.

(*Continued from Volume* 74.)

FISHER, *Appellant*, v. SELIGMAN.

1. **Corporation**: STOCKHOLDER'S LIABILITY. To sustain a claim of a right by contract to vote stock in a corporation without incurring the obligations of a stockholder, it must appear that at the time the stock was voted there was a contract in force authorizing the holder to vote it. Hence, where a corporation deposited its own unpaid and unsubscribed stock with a banking firm as security for advances to the corporation, to be held by the firm for the period of one year, but with no provision for voting the stock, and after the lapse of the year the firm did vote it and thereby elected their own board of

directors and so ultimately obtained complete control of the corporation; *Held*, that they had thereby brought themselves within the rule of liability laid down in *Griswold v. Seligman*, 72 Mo. 110.

2. ——: ——: ESTOPPEL. One who would be estopped to deny, as against a corporation, that he is a stockholder thereof, will also be held estopped as against a judgment creditor of the corporation.

3. ——: ——. No person will be regarded as holding stock as a "trustee" or by way of "collateral security," within the meaning of section 9, Wagner's Statutes, page 301, and, therefore, exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation in the ordinary course of business.

4. ——: ——. Courts will be sedulous in their endeavors to defeat all schemes and contrivances whereby parties may seek to receive and enjoy the benefits and privileges incident to the position of a stockholder and at the same time to be exonerated from the burdens imposed by law.

Appeal from St. Louis Court of Appeals.

REVERSED.

This was a proceeding by motion under the statute by Fisher, claiming as a judgment creditor of the Memphis, Carthage & Northwestern Railroad Company, an insolvent corporation, for execution against Joseph Seligman, an alleged stockholder of the corporation. The circuit court ordered execution to issue, and from this judgment Seligman appealed to the St. Louis court of appeals, which reversed the judgment and remanded the cause. From this latter judgment Fisher appealed to this court.

The evidence given on the trial showed the following state of facts: On the 15th day of May, 1874, plaintiff obtained judgment for $2,450 against the railroad company on an indebtedness which accrued January 21st, 1874. The company was then and ever afterward continued to be insolvent. It was organized under the general railroad law with a capital stock of $10,000,000. Joseph Seligman was a member of the firm of J. & W. Seligman & Co.,

bankers of New York. On the 14th day of March, 1872, this firm entered into a contract with the railroad company, which, after reciting that the road had been graded, bridged and tied, and the right of way obtained for twenty-seven miles, appointed Seligman & Co. financial agents for the negotiation of the first mortgage thirty-year bonds of the company, with a stipulation on their part to make certain advances of cash to be used in completing the road; in consideration of which the company agreed to deposit with them for sale its entire issue—5,000,000—of bonds, and also a majority of the capital stock which it was authorized to issue, the stock to remain in their control for one year at least. It was further stipulated that in the event that by some cause unforeseen Seligman & Co. should not succeed in the negotiation of said bonds, or any part of them, within twelve months, the railroad company should repay all sums of money advanced with interest, and in addition thereto a commission of two and a half per cent on all bonds returned by Seligman & Co.

To carry out this agreement, a deed of trust was executed on May 1st, 1872, to Jesse Seligman and one Stewart, as trustees, conveying the road and all its property and franchises, to secure bonds to the amount of $1,900,000. This deed provided that in case of default of interest the property conveyed should be surrendered to the trustees on demand. A certificate of stock, dated May 28th, 1872, issued to J. & W. Seligman for 60,000 shares in the Memphis, Carthage & Northwestern Railroad Company of $100 each, was produced on the trial from the possession of Seligman; as to which he testified that this stock was not paid for, or subscribed for, but issued as paid-up stock, in order that his firm might control the management of the company and the election of officers. This certificate was issued in accordance with a resolution of the board of directors ordering that, in making negotiations with the Seligmans, certificates for a majority of the stock be issued to them, to hold in trust for a period of twelve months.

It was admitted that only $800,000 worth of bonds were issued, of which the Seligmans, having made large advances on the bonds, became owners to the amount of $400,000. Then, in 1873, at a meeting of the Seligmans and other bondholders in New York, at which Judge Baker was present, it was agreed that Baker should become a director and president, with a view to protecting the bondholders. A proxy was accordingly made out by the Seligmans and handed to Baker, which proxy was voted by Mr. Blow for the Seligmans at the annual election in March, 1874, at which election Baker named the ticket, Seligman being named as one of the directors and Baker as another. The ticket was elected; Judge Baker then became president. Baker testified that the Seligmans knew, in a general way, of these acts, and that from the time of his connection with the road to the foreclosure of the mortgage, the road was controlled by the 6,000,000 of stock issued to the Seligmans. During the ten months that Judge Baker was president of the road, he did not apply its earnings to the payment of interest. The newly elected directors held only one meeting, which was held in October, 1874, under the presidency of Judge Baker; at which meeting they did only one thing, that is, they turned over the road to the trustees in the mortgage for non-payment of interest. The stock book of the road, which contained merely the list of stockholders, without the number of shares, showed the names of J. & W. Seligman as stockholders. The transfer book has the following entry:

NAME.	RESIDENCE.	DATE.
J. & W. Seligman.	New York, N. Y.	May 29th, 1872.
NO. OF SHARES.		AMOUNT IN DOLLARS.
60,000. Sixty Thousand. (Held in Escrow		6,000,000. Six Million.

These books were kept in obedience to the requirements of the corporation law of the State. Wag. Stat., 300, § 8.

Joseph Shippen for appellant.

This case is governed by the case of *Griswold v. Seligman*, 72 Mo. 110, and the numerous authorities therein cited. Defendants became and were stockholders in said railroad company, and in all respects liable as such, despite their secret agreements. Thompson on Stockholders, §§ 124, 129; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Burke v. Smith*, 16 Wall. 390; *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 67; *In re Empire City Bank*, 18 N. Y. 199; *Hatch v. Dana*, 101 U. S. 205; *County of Morgan v. Allen*, 103 U. S. 498. Defendants' conduct and acts estop them from making the defenses herein attempted. (1) By accepting and holding said absolute and unconditional certificate. Thompson on Stockholders, §§ 105, 161, 171; *Upton v. Tribilcock*, 91 U. S. 48; *Upton v. Englehart*, 3 Dill. 495; *Pickering v. Templeton*, 2 Mo. App. 424; *Van Cott v. Van Brunt*, 2 Ab. New Cas. 283. (2) By voting said 60,000 shares of stock. Thompson on Stockholders, § 160; 1 Wag. Stat., sub. 5, § 6, p. 300; *In re Reciprocity Bank*, 22 N. Y. 17; *Eaton v. Aspinwall*, 19 N. Y. 119; *Upton v. Tribilcock*, 91 U. S. 48. (3) By electing himself a director, and accepting and holding such position. 1 Wag. Stat., p. 299, § 6. Section 771, Revised Statutes 1879, has no application to this case. Thompson on Stockholders, § 224; *Stover v. Flack*, 30 N. Y. 70; *Johnston v. Laflin*, 6 Cent. L. J. 133; *Pullman v. Upton*, 96 U. S. 328; *National Bank v. Case*, 99 U. S. 628; *Brewster v. Hartley*, 37 Cal. 15; *Wheelock v. Kost*, 77 Ill. 296; *Hale v. Walker*, 31 Iowa 344; *s. c.*, 7 Am. Rep. 137; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Holyoke Bank v. Burnham*, 11 Cush. 183; *In re Empire City Bank*, 18 N. Y. 199; *Roosevelt v. Brown*, 11 N. Y. 148; *Newry R'y Co. v. Moss*, 14 Beav. 64.

John P. Ellis for appellant.

The control of a corporation can never be legally surrendered to its creditors, secured or unsecured. Where one, whether creditor or not, contracts with a corporation for its control through the use of a majority of its stock, receives the stock with the intention of using it for that purpose, afterward so uses it, and thereby acquires full corporate control, he has deliberately done that which can be done only by a stockholder. Having bargained for, used and enjoyed the privileges of a stockholder, he ought to be held to a stockholder's liability. One who holds, uses and votes stock for his own benefit, holds the stock *cum onere*, and to the extent of his interest is individually liable to the creditors of the corporation whose stock he so uses. *Maguire's case*, 3 DeG. & Sm. 31; *Bunn's case*, 2 DeG. F. & J. 295; *St. Charles Man'f'g Co. v. Britton*, 2 Mo. App. 290; *Webster v. Upton*, 1 Otto 68; *Sawyer v. Upton*, 1 Otto 56; *Upton v. Tribilcock*, 1 Otto 45; *Re Bachman*, 12 B. R. 223; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Sawyer v. Hoag*, 17 Wall. 610; *Wheelock v. Kost*, 77 Ill. 296; *Pullman v. Upton*, 6 Otto 328; *Am. R'y Frog Co. v. Haven*, 101 Mass. 398; *Farrar v. Walker*, 3 Dill. 506; *Schaeffer v. Mo. Home Ins. Co.*, 46 Mo. 248; *Adderly v. Storm*, 6 Hill 624; *Smith v. Heidecker*, 39 Mo. 157. It may be true that defendant could not have compelled the railroad company to permit him to vote his stock. But the company waived objection, accepted the defendant as a legal stockholder, and gave him full control of the corporation. Under these circumstances the defendant cannot be heard, even against the corporation, to dispute his conduct as a stockholder, much less against a creditor. *Holyoke B'k v. Goodman Paper Man'f'g Co.*, 9 Cush. 576; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Barrett v. Schuyler Co.*, 44 Mo. 197; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491. The acceptance and holding of a certificate

of shares in an incorporation makes the holder liable to the responsibility of a shareholder. In this case, in addition, the name of defendant's firm appeared in the list of stockholders required to be kept by the statute. 1 Wag. Stat., p. 300, § 6; *McLaughlin v. Detroit R. R. Co.*, 8 Mich. 100; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616; *Pullman v. Upton*, 6 Otto 328; *Upton v. Tribilcock*, 1 Otto 47, 48; *Roseveit v. Brown*, 1 Kernan 151; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Johnson v. Somerville Dyeing, etc., Co.*, 15 Gray 219; *Hoagland v. Bell*, 36 Barb. 57; *R. & W. Turnpike Co. v. Van Ness*, 2 Cranch C. C. 449; *Trumbull v. Payson*, 5 Otto 418. The actual delivery of stock cuts out the defense that it was in escrow. *Wight v. Shelby R. R. Co.*, 16 B. Mon. 4. A false entry upon the corporate books, in respect to the ownership of stock, will not avail the real owner as a defense against creditors. *Castleman v. Holmes*, 4 J. J. Marsh 1; *Roman v. Fry*, 5 J. J. Marsh, 634; *Sanger v. Upton*, 1 Otto 60; *Chaffin v. Cummings*, 37 Me. 76; *Harvey v. Kay*, 9 B. & C. 356; *Adderly v. Storm*, 6 Hill 624; *Schaeffer v. Ins. Co.*, 46 Mo. 248; *Thorp v. Woodhull*, 1 Sandf. Ch. 411; *Corwith v. Culver*, 69 Ill. 502; *Ruggles v. Brock*, 6 Hun (N. Y.) 164.

Section 9, page 301, 1 Wagner's Statutes, being section 771 Revised Statutes 1879, is by its terms applicable only to cases where some one other than the corporation remains liable to the creditors. So in case of collateral security, "the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder;" and in case of a trust, "the estate and funds in the hands of such * * trustee shall be liable." It is absurd to attribute the intention to the legislature of making the corporation liable as a stockholder, for it cannot be its own stockholder. *American R'y Frog Co. v. Haven*, 101 Mass. 398; *s. c.*, 3 Am. Rep. 377; *Dayton & Cin. R. R. Co. v. Hatch*, 1 Disney 84; *State v. Smith*, 48 Vt. 266; *Ex parte Holmes*, 5 Cow. 426; *Brewster v. Hartley*, 37 Cal. 15; *Wheelock v. Kost*, 77 Ill 296; *Pullman v. Upton*, 6

Otto 328; *Johnston v. Laflin*, 103 U. S. 800. Moreover, this stock was never pledged as collateral security; no rights of pledge were vested in the pledgee; no power of sale or other disposition. The deposit of stock was, in the answer, "to enable the defendant to control the organization of the corporation and the election of its officers." It is impossible to conceive of the control of a corporation being held as collateral security, and to understand how the stock, which accomplishes this control, has no owner or holder. The protection of the creditor is the paramount object the legislature had in view, and the act ought to receive such construction as will best accomplish this purpose. *Hager v. Cleveland*, 36 Md. 491. Outside the operation of this statute, the law is well settled that the ostensible owner of stock is liable to the creditors, notwithstanding he may in fact have held only in trust, or as collateral security. *Pullman v. Upton*, 6 Otto 328; *Holyoke Bank v. Burnham*, 11 Cush. 181; *Albert v. Savings Bank*, 1 Md. Ch. 407; *Matter of Empire City Bank*, 18 N. Y. 210; *Brewster v. Sime*, 42 Cal. 139. But supposing section 9 does apply to the case at bar, and the Seligmans, as trustees or pledgees, are not liable, still they were trustees or pledgees for themselves to the amount of at least $400,000, to which extent they are expressly charged by the statute with the payment of corporation debts

Harding & Buller and *R. E. Rombauer* for respondent.

There never was a contract between defendant and the corporation making defendant a stockholder. *Brewster v. Hartley*, 37 Cal. 15; *Seymour v. Sturgess*, 26 N. Y. 134, 145; *Pittsburgh & S. R. R. Co. v. Gazzam*, 32 Pa. St. 340. And defendant can show *aliunde* the stock certificate, and even the books of the corporation, under what circumstances the certificate was issued to J. & W. Seligman & Co. *McMahon v. Macy*, 51 N. Y. 155, 161; *Tonica, etc., R. R. Co. v. Stein*, 21 Ill. 96, 98; *Lathrop v. Kneeland*, 46 Barb.

432, 438; *Jones v. Portsmouth R. R. Co.*, 32 N. H. 544; *Pittsburgh, etc., R. R. Co. v. Stewart*, 41 Pa. St. 54. Defendant is not estopped from asserting that he is and was not a stockholder, no act of his having induced plaintiff to alter, injuriously to himself, his previous condition. Bigelow on Estoppel, p. 473, 560; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Howard v. Hudson*, 2 El. & B. 1; *Kinney v. Farnsworth*, 17 Conn. 355; *Cummings v. Webster*, 43 Me. 192; *Heath v. Derry Bank*, 44 N. H. 174; *Brown v. Wheeler*, 17 Conn. 345. The proceeding is statutory and in derogation of the common law. The plaintiff must establish that defendant is liable under the statute, which he has failed to do. 1 Wag. Stat., p. 301, § 9; *McMahon v. Macy*, 51 N. Y. 155, 161; *Skouten v. Wood*, 57 Mo. 382.

Broadhead, Slayback & Hauessler also for respondent.

It requires the assent of the corporation before an individual can become a member of it, and this generally must be done either by subscription to the stock of the corporation, or by a transfer to him on its books, and with its consent. In no other way can an individual become a member of the body corporate, and it is only as such a member of the body corporate that our statute intends that he should be held liable for the debts of the corporation. It is true that a man may so act in regard to third persons, as to be estopped from denying that he is a member of the corporation, and liable as such, but in that case he must have so acted as to cause third persons to incur liabilities, or sustain losses, upon the idea that he is a member.

I.

SHERWOOD, C. J.—In the case of *Griswold v. Seligman*, 72 Mo. 110, the legal points involved in the present record were fully discussed, and the rulings there made are decisive of the case before us. Inasmuch, however, as those

points have been re-argued in this instance, we have thought best to say somewhat more concerning them.

It was conceded in argument, by counsel for defendants, that if a party without any contract therefor, assumes the attitude and privileges of a stockholder; assuming unwarrantably the exercise of such privileges; assumes to vote as a stockholder, that thereby he will take upon himself all the burdens and liabilities incident to such a position. But the contention is made that here there was a written contract entered into between the corporation and J. & W. Seligman & Co., of which firm Joseph Seligman was a member. The record shows there was indeed a contract entered into as contended, but of what avail is such a contract, when it contained no provision that the members of the firm should acquire the rights of stockholders? Is it not manifest that this being so, the case must stand as if no such contract had been entered into? We cannot regard the matter in any other light. In a word, it is but the assertion of a truism to say that a contract which does not confer a right, cannot be relied on to support or uphold the exercise of such right; cannot be looked upon, so far as concerns that particular right, as any contract at all. The case stands here then on this point precisely as did the *Griswold case*; that of a party who votes as a stockholder, and, when the endeavor is made to fasten upon him the customary liability arising from such conduct, attempts to shelter himself under a contract giving him the alleged right to vote as a stockholder; but which contract when examined, is bare and barren of any such provision. But even if the contract gave such a right, a right to vote the stock, that contract expired by its own terms and limitation, in one year from the reception of the stock, May 29th, 1873, so that in any event, the voting of the stock, occurring as it did, after Seligman ceased to have any right to hold the stock as trustee, such voting was wholly unauthorized, and must, therefore, be attended by those consequences to which we have heretofore adverted.

II.

As to Joseph Seligman being estopped from denying that he is a stockholder, we hold, as we did before, that he is thus estopped. The fact that Seligman did not hold himself out to the world as a stockholder; the fact that Fisher, the creditor, at the time he gave credit, was not aware of Seligman's liability, is a matter altogether immaterial. If Seligman so conducted himself toward the corporation as to preclude himself from denying as to the corporation, that he was a stockholder, by the same steps he estopped himself as toward any creditor, who, under our law, succeeds and is subrogated to the corporate rights and assets. And there is nothing novel in this application of the doctrine of estoppel. Subrogated as the creditors are, to the rights of the insolvent corporation, among those rights will be included those acquired by reason of estoppel as well as those acquired in the ordinary way. The authorities cited in the *Griswold case* fully sustain and illustrate this. Nothing is more common in the law of estoppel than that a party estopped as toward a particular person, is likewise estopped against all claiming under or in privity with such person. In instances like the present, the creditor claims under, represents and stands in the shoes of the corporation, and doing this, is entitled to advantage himself to the same extent as could the corporation. According to the authorities cited on a former occasion, already referred to, had Seligman been sued for calls, it would not have lain in his mouth after assuming to act as a stockholder, to resist such action by denying what he had before by his conduct asserted.

III.

Nor are our views changed as to the effect of section 9, Wagner's Statutes, page 301. "No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral

security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian or trustee shall be liable, in like manner and to the same extent as the testator or intestate, of the ward or person interested in such fund would have been if he had been living and competent to act, and held the stock in his own name." Joseph Seligman cannot be regarded as holding the stock in the capacity of "trustee," nor as holding it as "collateral security," within the meaning of that section. This section, according to the plain import of its terms, relates to stock already issued in ordinary course of business, and which subsequently comes into the hands of either a trustee of some person laboring under a disability, as *ex. gr.*, *a femme covert*, or into the hands of the administrator of the estate of some decedent, or into the hands of a guardian of some infant; or, lastly, into the hands of a pledgee as "collateral security." In the last instance the "person pledging such stock shall be considered as holding the same and liable as a stockholder accordingly." This person is the pledgeor, and is "personally subject to *

* liability as a stockholder of such company."

It is not pretended here that there is any person who pledged this stock—that any person is liable thereon; and so it is not possible that the statute in question should apply. In every case of pledging stock, within the meaning of the statute, there must be a stockholder whom the law, notwithstanding he has pledged his stock, still considers as occupying his original attitude and responsibilities, and, therefore, looks to him and holds him individually answerable. The bare statement of this case shows no such individual pledgeor; no person against whom the creditor, if remediless in consequence of the insolvency of the corporation, could seek redress. He might recover judgment; he might have an execution issued; that writ be returned

nulla bona, but when he had gone to such legal extremity, he would, if a certain theory is to prevail, find that though stock in abundance had been issued, that though it had been pledged, that no one was responsible on that stock either as pledgeor or as stockholder.

But enough on this point. Take another instance mentioned in this section and the view becomes no better for Seligman. He is a "trustee," it is said, but who is his *cestui que trust?* What "estates and funds in the hands of such * * trustee," are there, which can be made "liable in like manner and to the same extent as the * * person interested in such fund would have been if * * competent to act and hold the stock in his own name?" Is it not plain that the statute, when speaking of the "estates and funds" of the person beneficially interested, does not and cannot refer either to the corporation or to the assets and funds thereof? If it does not thus refer, then this of itself must conspicuously show both that there were no "estates and funds" in the hands of the alleged trustee, and that of consequence, he is not the sort of fiduciary whom the section exempts from liability.

That section treats of two and only two kinds of liability; one personal, that imposed on the pledgeor of stock; the other, that imposed on the estates and funds of him "who, if * * competent to act," would have "held the stock in his own name." This record presents neither kind of liability, and as it does not, there are no circumstances upon which section 9 can operate. This being the case, that doctrine is properly invoked here, which declares that a person who assumes the anomalous attitude of a trustee, when representing no *cestui que trust*, becomes personally liable. This principle finds apt illustration in *Johnston v. Laflin*, 5 Dill. 65. Britton bought stock with the bank's funds and had it registered in the books as held by "Britton, trustee for the bank;" and because there was no *cestui que trust* who could become liable, the

liability incurred was fastened on the party who unwarrantably assumed to act as a fiduciary.

IV.

There have been many devices, many schemes, many cunningly devised transactions whereby men have sought to receive every benefit and yet shirk every burden incident to the position of a stockholder, but such devices have generally come to naught. The courts have been sedulous in their endeavors to bring about such a result. We have no doubt that the matters set forth in this record are of the nature indicated, and we cannot better illustrate our views than by quoting the language of the learned judge of the court of appeals: "A method of issuing bonds and selling no stock, but issuing paid up stock, on which nothing has ever been paid, to the bond-holder, who is to vote the stock, and, when called by a creditor, to say that though nothing has ever been paid on the stock, and no one is liable upon it; that his voting was illegal though it gave him control of the road; and that he merely held the stock as collateral though it represented no indebtedness of anybody, no property, and nothing but a right to vote—would seem to be an ingenious evasion of the law." So say we, and, therefore, reverse the judgment of the court of appeals and affirm that of the circuit court. HOUGH and RAY, JJ., concur; HENRY, J., as heretofore; NORTON, J., dissents.

Dissenting Opinion.

NORTON, J.—This case, so far as the questions in it are concerned, is on all fours with the case of *Griswold v. Seligman*, 72 Mo. 110. For the reasons given in my dissenting opinion in that case, which it is not necessary here to repeat, I do not agree to the opinion and judgment rendered in this case.

LINCOLN v. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant.*

1. **Amendments**: RAILROADS: INJURY TO LIVE STOCK. In an action against a railroad company for injury to live stock, the statement originally filed alleged that the injury was caused by failure of the company to erect and maintain cattle-guards as required by the 43rd section of the Railroad Law. An amended statement was afterward permitted to be filed charging the same injury, but alleging that it occurred in consequence of the failure of the company to construct a crossing where its road crossed a public highway, as required by the act of 1875 amending section 39 of the Railroad Law, (Sess. Acts 1875, p. 130;) *Held*, that there was no error in permitting the amendment.
2. **Justices' Courts**: PLEADING. Plaintiff may state his cause of action in two counts as well in a justice's court as in the circuit court.
3. **Railroads**: PUBLIC CROSSINGS. Under the act of 1875, *supra*, it is the duty of a railroad company to construct a proper crossing wherever its road crosses a public highway without being notified to do so by any officer in charge of the highway. The notice provided for in the act is but a mode of securing the crossing in the event of failure of the company to construct it.

   The act is not intended solely for the protection of travelers upon the highway. The owner of an animal injured in consequence of failure of the company to comply with its provisions may avail himself of them.

Appeal from Madison Circuit Court.—HON. WM. M. NALLE, Judge.

AFFIRMED.

Wm. R. Donaldson and *Smith & Krauthoff* for appellant.

B. B. Cahoon for respondent.

HENRY, J.—This action was commenced before a justice of the peace to recover damages for the killing of a mare belonging to plaintiff. The original statement was based on the 43rd section of the Railroad Law, alleging a failure on the part of defendant to erect and maintain cat-

tle-guards at places where they were required by law. An amended statement was filed before the justice of the peace, the second count of which was substantially the same as the original statement, and the first was based on the act of 1875, alleging a failure by the company to construct such a crossing, where its railroad crossed a public road, as that act requires, by reason of which plaintiff's mare "got fastened between one of defendant's rails and a part of said defective crossing." From a judgment in favor of plaintiff, defendant appealed to the circuit court, where he filed, successively, motions to strike out the amended statement, and to require plaintiff to elect on which count he would stand, which were overruled, and on a trial plaintiff again had judgment, from which this appeal is taken.

Appellant's counsel contend that plaintiff having commenced his action under the 43rd section, could not recover under any other section. His amended statement filed with the justice, contained two counts, in each of which he claimed damages for one and the same injury. There were not two subjects of complaint, but two different statements of the same injury. This is allowable as well in a justice's court as in the circuit court.

Luckie v. Railroad Co., 67 Mo. 245; *Cary v. Railroad Co.*, 60 Mo. 209; *Wood v. Railroad Co.*, 58 Mo. 109; *Crutchfield v. Railroad Co.*, 64 Mo. 255, and *Hansberger v. Railroad Co.*, 43 Mo. 196, cited by appellant's counsel, involve a different question. The statements in those cases contained but one count, and were severally based upon but one section of the statute, and it was held, that plaintiff must recover on the cause of action stated before the justice of the peace, or not at all; that he could not by amendment in the circuit court, have any other cause tried than that which was tried before the justice of the peace.

Nor did the court err in refusing to compel plaintiff to elect on which count he would stand.

Counsel for appellant err in their construction of the act of 1875. The requirement upon the company to con-

struct and maintain crossings, where its road crosses a public highway, is imperative, and the provision authorizing overseers, etc., to construct them, if the company fail to do so, after notice given, as required, within sixty days after notice served, etc., at the expense of the company, is not a qualification of the requirement upon the company, but a mode provided for securing the crossings in the event of a failure of the company to construct them. It is in every respect analogous to the section requiring railroad companies to erect fences, and authorizing the owners of lands, through which such a road runs, to erect the fence and recover the expense from the company if the latter fail to build the fence as required by the statute.

Nor is it true that the act of 1875 was intended merely for the protection of travelers upon the highway. It makes the corporation "liable for all damages resulting from neglect to construct such crossing," and it was alleged in plaintiff's statement, and we assume proven on the trial, that the animal was injured in consequence of the defective construction of the crossing in question. The judgment is affirmed. All concur.

CRANSTON v. THE UNION TRUST COMPANY *et al.*, *Appellants.*

1. **Railroad**: LABORER'S LIEN: JUSTICES' COURTS. The statute does not confer upon justices of the peace jurisdiction of suits to enforce liens for labor done upon a railroad.
2. ——: ——. A lien for labor done on a railroad must be enforced against the whole road, not against so much only of the road as is benefited by the labor.

Appeal from Monroe Circuit Court.—HON. JOHN T. REDD, Judge.

AFFIRMED.

T. J. Portis and *E. A. Andrews* for appellants.

A. M. Alexander for respondent.

HOUGH, J.—This was a suit instituted in the circuit court of Monroe county, to enforce a lien against the railroad of defendant, for work done upon its road-bed amounting in value to the sum of $22.43. The plaintiff recovered judgment and the defendants have appealed. Two grounds of error are alleged. 1st, That as the amount sued for was less than $50, the circuit court had no jurisdiction. 2nd, That the lien should have been enforced only against that portion of defendant's road which was benefited by the plaintiff's labor.

Section 1102 of the Revised Statutes confers upon circuit courts "exclusive original jurisdiction in all civil cases, which shall not be cognizable before the county courts, probate courts and justices of the peace, and not otherwise provided by law." Article 4, chapter 44 of the Revised Statutes confers jurisdiction upon justices of the peace to enforce ordinary mechanics' liens, but no jurisdiction has ever been conferred upon justices of the peace to enforce liens against railroads. Under section 1102 of the Revised Statutes, the circuit court has exclusive jurisdiction of such suits.

The second point relied upon by defendants, has been recently decided by this court against them, in the case of *Knapp v. St. Louis, K. C. & N. R'y Co.*, 74 Mo. 374.

The judgment of the circuit court will, therefore, be affirmed. All concur.

BRAY'S ADMINISTRATOR v. SELIGMAN'S ADMINISTRATOR.

1. **Practice**: PLEADING: ESTOPPEL. A party who has tried his case upon a theory involving the tacit concession of a particular fact, will not be permitted in the appellate court to obtain a reversal of the judgment against him upon a theory involving a denial of that fact.
2. **Stockholder's Liability**: PARTNERSHIP. Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually, as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability.

Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS, Judge.

AFFIRMED.

Bray filed a motion in the Jasper circuit court, at the September term, 1875, asking for the issuance of an execution in his favor for the sum of $2,000 and interest thereon against Seligman, alleging as the grounds of his motion: The recovery by him in said court at the November term of a judgment for said sum against the Memphis, Carthage & Northwestern Railroad Company, the issuance of an execution on said judgment returnable to the March term, 1875, of said court, and a return of *nulla bona* thereon by the sheriff of Jasper county; that at the date when said execution was issued Seligman was the owner of $6,000,000 of the capital stock of said company, all of which was unpaid; that Seligman had been duly notified that application would be made at the September term, 1875, of said court, for an execution against him for the amount of the judgment so recovered as aforesaid.

Thereupon Seligman filed the following answer: Now comes Joseph Seligman, and for his answer herein to plaintiff's motion for execution against him as an alleged stockholder of the defendant corporation, says, as to whether plaintiff obtained a judgment against said corporation, and obtained an execution against the same, or as to whether

said execution was returned *nulla bona* or not, he has not sufficient knowledge or information to form a belief. And this defendant, for further answer, says it is untrue that he ever was, or is now, a stockholder in said corporation, and says, that in truth, he never was the owner or holder of any stock in said defendant corporation, except as hereinafter stated. And he says that in the year 1872, said corporation issued certain bonds to the amount of about $800,000, which bonds were secured by a deed of trust on all the property of said corporation; that the firm of J. & W. Seligman & Co., of New York, was made the financial agent of said corporation to negotiate and sell said bonds in the market, of which firm this defendant was a member; that one of the members of said firm, to-wit: Jesse Seligman, was one of the trustees in said deed of trust; that said bonds were negotiated and sold; that said firm made large advances on said bonds and became a holder of the same to the amount of over $400,000; that all of the property of said corporation, including its railroad, rolling stock, earnings and income, were pledged by said deed of trust, to the payment of said bonds and the interest thereon; that the capital stock of said corporation was $10,000,000, and six millions of the said stock were deposited with said firm of J. & W. Seligman & Co., in trust, as security for the payment of said bonds, to be held by said firm for the purpose of controlling said corporation and its organization, so that the affairs of the same should be managed honestly, and the earnings applied to the payment of said bonds and the interest thereon, and for no other purpose; said stock being the property of said corporation, to be returned to it, and was only held in trust and as additional security for the payment of said bonds, and for no other purpose; and defendant says he never subscribed for, bought or held any of the stock of said corporation, except as above stated; wherefore, he says no execution ought to issue against his property for the debt of said defendant corporation.

Upon the trial the plaintiff offered in evidence the record of the judgment and the executions that were issued thereon, one to the sheriff of Jasper county, and one to the sheriff of Lawrence county. The return by the sheriff on the former was, that he had executed the writ in the county of Jasper on the 27th day of January, 1875, by levying upon all the right, title, interest and claim that the corporation had in the right of way for their railroad over a strip of land 100 feet wide, being fifty feet wide on each side of the center of the road-bed as the same was surveyed and constructed through the town of North Carthage, and also in a number of lots, designating them, situated in said town. The sheriff further certified that the execution was returned by order of plaintiff March 8th, 1875. The return on the Lawrence county execution was dated February 27th, 1875, and stated that he had been unable to find any property of defendant in said county. The testimony of plaintiff's witnesses tended to show that at an election for officers of the company in March, 1873, a $6,000,000 certificate of stock was voted by the proxy of J. & W. Seligman & Co., to whom it had previously been issued by the company, and that Joseph Seligman, defendant's intestate, was a member of that firm; that said firm did not subscribe for the stock, and did not pay for it; that they made advances or loaned money to the company; that they held all the company's bonds in the beginning, and were to act as its financial agents in the city of New York, and sell its bonds, and the object in giving them the stock was to assure to them the control and management of the road, so as to secure the bonds; that the stock was to remain the property of the company and be returned to it and was issued in pursuance of a resolution of the board of directors ordering that in making negotiations for money with said firm that a certificate for a majority of the capital stock of the company be issued to said firm to hold in trust for the period of twelve months; that Jesse Seligman, one of the members of the firm, was also one of the

trustees in a deed of trust executed by the company to secure its bonds. Defendant offered no evidence, but elicited on cross-examination part of the testimony stated.

The declarations of law asked by, and given on behalf of, plaintiff, were the following:

1. If the court finds from the evidence that Joseph Seligman was a member of the firm of J. & W. Seligman & Co., and that said firm held and voted the majority of the stock of the said Memphis, Carthage & Northwestern Railroad Company, amounting to $6,000,000, and did by virtue thereof, actually control the management of said company for their own advantage, in securing themselves for money advanced in the building of said railroad, and putting the same in operation, and that said firm continued to so hold and vote said stock until said company became insolvent, and until plaintiff's execution was issued, then said firm is liable for the amount of said stock, and the defendant is also individually liable to the like extent, although there may never have been any other transfer to them of said stock, than by the certificate thereof produced in evidence.

2. That if the defendant, or his firm, furnished the money whereby said road was constructed and put in operation, and had the control of a majority of the stock of said company, voting the same at the elections of the company for officers, and thus the management of the road was entirely in the hands of said firm, for their own benefit, as well as that of others, their said stock was not held in such fiduciary capacity as is contemplated in section 9, chapter 63, page 336, General Statutes.

3. If the court finds from the evidence that the majority of the stock of said company appeared on the stock book of the company in the name of the defendant, or in the name of the firm of which he was a member, and that the defendant, or his said firm voted said stock, either in person or by proxy, at the election of officers for the company, then the defendant is estopped from now claiming

that he held said stock as merely collateral security, or in some fiduciary capacity, but must be held in all respects (as to third parties dealing with said company) as the absolute owner or owners of said stock.

4. That if the court finds from the evidence that the certificate attached to Seligman's deposition, representing six millions of the stock of said company, represented all the stock of said company, except small amounts issued to enable other persons to vote at elections, and that said firm of Seligman & Co. held the same so as to enable them to control the election of officers, and the management and control of the road, and that they did so use said certificate of stock; and that said stock stood on the book of said company, known as the stock book, in the name of defendant, or J. & W. Seligman & Co., then although, the certificate as given in evidence, states that it was issued in trust to enable said Seligmans to protect themselves and others, and pay the debts of the company, and to secure them for any advances that they may have made, and to give credit to the bonds of said company deposited and held by said Seligman and others, then the defendant is bound as a stockholder to creditors of said company

Declarations of law asked by defendant, but refused, were the following:

1. Unless the court should find the fact to be, that Joseph Seligman was a stockholder or the owner of stock in his own right in the defendant corporation, the court declares the law to be, that no execution can lawfully issue against him on plaintiff's judgment, and if the court finds the fact to be, that the firm of J. & W. Seligman & Co. (of which firm Joseph Seligman was a member) held 60,000 shares of stock in said defendant corporation, in trust or as collateral security, for the benefit of the bondholders or creditors of the company, and to enable them as financial agents of the company, to successfully negotiate and sell its mortgage bonds, which stock was issued to them in pursuance of a resolution of the board of directors, and

did not hold said stock as absolute owners of the same, then said firm, nor any member of the same, is liable under the laws of this State, to an execution for the amount of plaintiff's judgment.

2. Even if the firm of J. & W. Seligman & Co. (of which firm Joseph Seligman was a partner) were stockholders, and as such, liable, still the court declares the law to be, that an execution cannot issue against one individual member of said firm, because the interest cannot be severed, but an execution would have to be issued against the firm.

The trial court found, and gave judgment, for the plaintiff. In its finding it recited the fact of the insolvency of the corporation. The grounds assigned in defendant's motion for a new trial were the following: (1) The court erred in refusing declarations of law asked for by defendant. (2) The court erred in granting declarations of law asked for by plaintiff. , (3) The court erred in awarding execution against defendant, because defendant was shown by the evidence not to have been a stockholder. (4) The court ought to have overruled the motion for execution. (5) The finding of the court is contrary to the evidence. (6) The finding and judgment of the court is contrary to the law. This motion was overruled, and defendant appealed to this court.

James O. Broadhead and *H. H. Harding* for appellant.

The sole ground of the motion was that an execution had been issued to Jasper county, and that the sheriff had returned it "no property found," which the evidence did not sustain. The motion did not refer to the Lawrence county execution at all. All the proceedings prior to the motion for execution were against the corporation and afford no presumptions against Seligman. The finding of fact in the judgment that the corporation was insolvent was an impertinent finding. It was not alleged in the motion

nor in any manner put in issue, nor was there any evidence whatever on the subject. The return of the sheriff on the execution issued to Jasper county not only does not show that no property of the corporation could be found whereon to levy, but does show that a large amount of property was found and seized and levied on as its property, and then that plaintiff ordered the execution returned. There was no evidence that the property levied on was not the property of the corporation, or that it was for any reason insufficient to satisfy the execution; nor was there any evidence whatever of the insolvency of the corporation.

In the *Griswold case* this court put some stress upon the fact that parol evidence was not admissible to show how they held the stock, or that they held it as collateral security or in trust, etc. In this case the whole evidence is parol, and all introduced by the plaintiff himself. He saw proper to show the whole transaction just as it was. If that evidence establishes one thing more clearly than another, it is that the Seligmans had no relation to that corporation except as loaners of money to it on the security of that stock and the mortgage bonds. That was the understanding of all the parties at the time. They were not promoters or originators of the corporation, inducing others to take stock in it or to credit it. It was a local corporation organized down in Southwest Missouri to build a railroad. It ran short of money, and went to New York to borrow. Seligmans were bankers engaged in loaning money on that class of securities, and an arrangement was made by which they were to loan this corporation money; of course they took security. What security did they take? Why, a deposit with them of the mortgage bond and a majority of the capital stock. Now is it possible any court can say that in thus taking security as they supposed, and as all parties understood it, they were, instead, assuming a stupendous liability—a liability for $6,000,000. But the plaintiff claims that they voted it and got control of the corporation. Who was wronged by that? Cer-

tainly not the corporation, for its officers assented to the voting and all seemed to understand that it was contemplated that it might be voted. The Seligmans did not own the stock—they could not sell or transfer it—they were to have no beneficial interest in it—could draw no dividends—could not hypothecate it—they were to return it to the corporation, whose property it was all the time. It is true that this court seemed to say in the *Griswold case* that a corporation could not own its own stock; but surely, in the light of the law, as determined by numerous decisions, when that question has been directly involved, that expression of the court was not well considered, and we think will not be adhered to. A corporation may own, buy and sell its own stock. *U. S. Trust Co. v. Harris*, 2 Bosw. 75; *State Bank v. Fox*, 3 Blatch. 431; *Robison v. Beal*, 26 Ga. 17; *Van Cott v. Van Brunt*, 82 N. Y. 535. Instead of estoppel existing in favor of the corporation as against Seligmans, it is clearly the other way; the corporation is estopped from now saying that the Seligmans held the stock in any other way than as security. The corporation got nearly half a million of their money on that as security, not as stockholders. Surely on every principle of justice and reason they can invoke in their favor the doctrine of estoppel, as against the railroad company. Nothing has been more common in this country than secured creditors being compelled to take the property of mortgageors—both individuals and corporations—thus leaving unsecured creditors (as in this case) unprovided for.

Jere C. Cravens for respondent.

The legal title to issued stock must reside in some person other than the corporation. The fact that the Seligmans were stockholders, is proved both by the certificate itself and by their participation in the election of officers. *Adderly v. Storm*, 6 Hill 624; *Rosevelt v. Brown*, 11 N. Y. 148; *Wheelock v. Kost*, 77 Ill. 296. A party can-

not hold stock in his own name for the purpose of controlling the management of a corporation and then be permitted to say that he holds the same only as collateral security. *Pullman v. Upton*, 6 Otto 328; *National Bank v. Case*, 9 Otto 628; *Barrett v. Schuyler Co.*, 44 Mo. 197; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Gill v. Balis*, 72 Mo. 424. A corporation cannot be a stockholder of its own issued stock. *Ex parte Holmes*, 5 Cow. 426; *State v. Smith*, 48 Vt. 266; *Am. R'y Frog Co. v. Haven*, 101 Mass. 398; *Griswold v. Seligman*, 72 Mo. 110. Parol evidence was competent to prove the defendant a stockholder, and that he voted said stock. *Dows v. Naper*, 8 Reporter 522; 1 Greenl. Ev., (Rev. Ed.) § 97; *Massey v. Westcott*, 40 Ill. 160; *Wardwell v. McDowell*, 31 Ill. 364.

But it is contended that there was no evidence of the corporation's insolvency. Was not the case tried on both sides on the theory that such was the fact—was any question made as to the solvency of the corporation? Is the idea that it was solvent, even hinted at anywhere throughout the record? Is all this to go for nothing? But the court did find from the evidence that the corporation was insolvent; are no presumptions to be indulged in favor of the court's finding? The instructions asked by plaintiff and given, are hypothecated on the fact of insolvency. How is this court to overthrow the presumptions in favor of that finding. How is the court to determine (even in the absence of evidence in record) that the insolvency of the corporation, the sale of its assets and franchises, and its utter demolition, was not apparent to the court trying the case, because of its very notoriety. 1 Wharton Ev., (2 Ed.) §§ 329, 330; *Waldo v. Russell*, 5 Mo. 393; *Wayne Co. v. St. L. & I. M. R. R. Co.*, 66 Mo. 77; *Davis v. Brown*, 67 Mo. 313; *Fields v. Hunter*, 8 Mo. 131. If this whole transaction was not a cunningly devised scheme to enable capitalists to build, equip and operate a railroad without being subjected to the legal liabilities attending such enterprises—"to play fast and loose" as occasion and their

pecuniary interest might dictate—to fraudulently evade the laws of the land; it certainly evinces the most wonderful adaptation of means to an end that has ever come to pass by chance.

I.

SHERWOOD, C. J.—This case, in its essential features, is like *Griswold's case*, 72 Mo. 110, and *Fisher's case*, *ante*, p. 13. This point of difference is, however, presented by this record: Two executions were issued against the corporation, one to Lawrence county, the other to Jasper county, the former returned *nulla bona;* the latter levied on certain property, consisting chiefly of the road-bed of the corporation—the residue being lots in North Carthage. Defendant filed his answer, wherein he set forth certain grounds and reasons why recovery should not be had against him, but made no issue as to the insolvency of the corporation. At the trial such insolvency was tacitly conceded. This being the case, it is quite too late to raise an objection on this score now. As numerous decisions of this court attest, a party will not be allowed to try his cause on one theory in the trial court, and then, if beaten there on ground of his own choosing, spring a fresh theory on his adversary in this court. Besides, the motion for execution alleged the insolvency of the corporation. The defendant answered the motion by filing a formal answer thereto. This it seems he need not have done under the provisions of section 13, page 291, 1 Wagner's Statutes; but having elected thus to do, and having failed to deny the insolvency of the corporation, that fact must be deemed as much admitted as though a formal pleading were requisite.

II.

The declarations of law asked by plaintiff, were in full conformity with our views as heretofore expressed in the cases already cited. And we regard as unsound the position assumed in defendant's second declaration of law, to

the effect that an execution cannot issue against one, a member of a firm of stockholders, but must issue against the firm. Each member of a partnership is liable for the indebtedness of the firm. The liability of the partners is joint and several, and we see no reason, founded in principle, why in a proceeding like the present, one member of a firm may not be held answerable, as if he were sued in an ordinary action on the partnership indebtedness; in which latter event no doubt could be entertained. The result is, that we affirm the judgment. HOUGH and RAY, JJ., concur.

WILSON v. MILLIGAN, *Appellant.*

1 **Unrecorded Chattel Mortgage:** PURCHASER WITH NOTICE. A purchaser of personal property from a mortgageor in possession will hold it against the mortgage, if unrecorded, even though he had notice of it—at least, if it remains unrecorded an unreasonable length of time.

2. **Sunday Sale:** SUBSEQUENT RATIFICATION. A party having bought property on Sunday in consideration of an antecedent debt, during the succeeding week sent a receipt to the vendor for both the property and the debt. *Held*, a ratification of the contract.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

REVERSED.

Chas. A. Winslow and *Boyd & Vaughan* for appellant.

H. E. Howell for respondent.

NORTON, J.—This cause is here on the appeal of defendant from a judgment rendered in the Greene county circuit court, and involves as the principal question whether

an unrecorded mortgage of personal property, when the possession of the property remains with the mortgageor, can be enforced against a creditor who purchases the property with actual notice of the existence of the mortgage. An affirmative answer to this question affirms the judgment, and a negative answer reverses it. A negative answer was returned to the question by this court in the case of *Bryson v. Penix*, 18 Mo. 13, where it was held that the purchaser of personal property from a mortgageor in possession will hold against a prior unrecorded mortgage even though he had notice of it. This principle was re-affirmed in the case of *Bevans v. Bolton*, 31 Mo. 437. Judge Scott, who delivered the opinion in the case of *Bryson v. Penix*, *supra*, observed that the statute prescribes no time within which such mortgages shall be recorded, and that under such circumstances a party must have a reasonable time for that purpose, which is to be determined by the circumstances of each case; and where a deed is recorded within a reasonable time it has relation back to the time of execution. Conceding this doctrine to be authoritative for the purpose of this case, without giving it our sanction, looking at the facts disclosed by the evidence, that the mortgagee was in the county seat with free access to the recorder's office the day before he filed it for record, and having this opportunity to record it, not only failed to avail himself of it, but took it home with him, believing that it was not necessary to record it, plaintiff can take no benefit from the above principle. A mortgagee who has had both the time and opportunity to file his mortgage for record, and postpones doing so to a future time, cannot be said to have filed the same within a reasonable time; and the court committed error in instructing the jury that the mortgage in question was recorded in a reasonable time, and in refusing an instruction asked by defendant to the effect that under the evidence the mortgage was not recorded in a reasonable time. The instructions given by the court as to the validity of the mortgage as against defendant, not

being in harmony with the principle enunciated in the above cited cases, should have been refused, and those asked by defendant upon the validity of the mortgage as to defendant, should have been given.

As the errors noted necessarily lead to a reversal of the judgment, we deem it unnecessary to advert to the objection made that the verdict is not responsive to the issues made in the pleadings, as whatever of informality exists in this respect can be corrected on a re-trial.

The instruction given by the court to the effect that if defendant bought the property on Sunday in consideration of antecedent debts, and during the week subsequent to said Sunday sent his receipt to the vendor for the property as well as a receipt for the debt the mortgageor owed him previous to said Sunday, that such action was a ratification of the agreement, is not subject to the objections made to it. Except in the particulars noted, the case was properly tried. Judgment reversed and cause remanded, in which all concur, except RAY, J., absent.

AMONETT v. MONTAGUE, *Appellant.*

1. **Suit by Third Party on a Contract for his Benefit**: WITNESS. Where a third person sues upon a contract made for his benefit in the state of Louisiana (as by the law of that state he may) the fact that the other party to the contract is dead will not, in the courts of this State, prevent the party sued from testifying in his own favor.

2. ———: REVOCATION: FAILURE OF CONSIDERATION: CONFLICT OF LAWS. Under the law of Louisiana it is a good defense to an action by a third person upon a contract made for his benefit, to show either that the contract was rescinded by the parties before it was accepted by the plaintiff, or that the consideration for it has failed; and this rule will be enforced by the courts of this State in such an action brought here upon a contract made in Louisiana.

3 ———: LIMITATIONS. A plea that a note is barred by the statute of limitations will be no defense to an action by the holder of the note against a party who has agreed with the maker to pay it.

Appeal from Randolph Circuit Court.—Hon. G. H. Burckhartt, Judge.

Reversed

The facts will be found stated in the opinion in volume 63 Mo. Rep. 203.

Gage & Ladd for appellant.

1. Under the laws of Louisiana, the Montagues, father and son, had complete control of the contract and might rescind or abandon it at their own arbitrary volition, at any time before the plaintiff consented to it. Whatever would be a good defense for the sons against a suit by the father, is equally good against this action by plaintiff. La. Civil Code, arts. 1884, 1896; *Tiernan v. Martin*, 2 Rob. (La.) 523; *Brandon v. Hughes*, 22 La. Ann. 360; *Mitchell v. Corley*, 5 Rob. 243; *Union Bank v. Bowman*, 9 La. Ann. 195; *Janney v. Ober*, 28 La. Ann. 281.

2. Delivery of possession of the property sold, especially of the slaves, was an essential part of the act of sale; without it there was no consideration for the undertaking of defendant. Having failed to consummate the sale by delivery, Robert V. Montague could not have recovered from his sons, and consequently plaintiff cannot recover. Benjamin on Sales, (2 Ed.) book 2, chap. 7; La. Code, art. 2458.

3. Robert V. Montague, by the agreement sued on, guaranteed to his sons the title to all the property conveyed. A portion of the lands were subject to mortgages to plaintiff, Hinds and others. The title to these lands has thus far failed. The creditors did not, during the life of R. V. Montague, consent to accept the assumption of the vendees; it was, therefore, beyond their power to obtain a clear title to the lands. Under these circumstances the father could not enforce the contract, and consequently plaintiff cannot.

4. Robert V. Montague's debt to plaintiff was barred by the statute of limitations of Louisiana before plaintiff assented to the stipulation in his favor. The contract of defendant was to pay—not the notes sued on—but "due to B. F. Hinds and J. I. Amonett, amounting, principal and interest, to about $12,000." It was a sum due and owing The sons could only pay what their father owed. The father died April 21st, 1866. The statute of limitations barred the debt and it could not be revived, he being dead. The contract of defendant does not create or extend the father's liability; it only agrees to meet it.

5. Either plaintiff was incompetent to testify, or Montague was competent. Under the law of Louisiana certainly, a third party for whose advantage a promise is made, by consenting thereto, becomes a party to that contract The contract between the father and sons, before it was assented to by plaintiff, was in the nature of a proposition to plaintiff by the father and sons, that the sons might and would—with plaintiff's consent—pay him the father's debt. By consenting he accepted the proposition so made. That proposition so made and accepted constituted a contract between plaintiff, of the one part, and the father and sons of the other part, or else it was a tripartite contract between the father of the first part, the sons, of the second part, and plaintiff of the third part. If the former view is correct, then, there being two parties of the first part, and only one of them, the father, dead, all the remaining parties are competent, and it was error to exclude defendant If the latter view is the proper one, and the contract tripartite, then one party being dead, all the remaining parties were incompetent, and the plaintiff should have been excluded *Fulkerson v. Thornton*, 68 Mo. 468

Chas. A. Winslow and *T. Shackelford* also for appellant.

The contract between defendant and Robert V. Montague, is not, in a direct and literal sense, "in issue and on

trial" in this action, within the meaning of the statute, but is only incidentally involved as it respects the original parties. The real "contract or cause of action in issue and on trial" here, is the promise of defendant to Robert V. Montague to pay plaintiff's debt, to which the law by a fiction attaches a privity in favor of plaintiff, and permits him to sue upon it as though originally entered into with him. In other words, for the purpose of maintaining the action the law treats the contract as one between plaintiff and defendant. Or, treating Robert V. Montague as the trustee of an express trust, as was done in *Rogers v. Gosnell*, 51 Mo. 466, the same results would follow. In either case, his death would not render either party to this action an incompetent witness. If incompetent as to some matters, defendant was certainly not so as to all. *Looker v. Davis*, 47 Mo. 140; *Poe v. Domic*, 54 Mo. 119; *Martin v. Jones*, 59 Mo. 181; *Amonett v. Montague*, 63 Mo. 201; *State v. Huff*, 63 Mo. 288; *Bradley v. West*, 68 Mo. 60. Under article 1895 Louisiana Civil Code, the Montagues had a right to rescind the contract, and this was a good defense. *Davis v. Calloway*, 30 Ind. 112; 15 Am. L. Rev. 250. So much of the answer as set up a failure of consideration presented a valid defense to this action. The consideration which supports the plaintiff's action is the consideration which supports the deed containing the promise on which he sues. It is in legal effect an action for the purchase money reserved in the deed. In an action by the grantor against the grantees for this purchase money the failure of the consideration, total or partial, would have been a good defense. Why, then, cannot the same defense be made available against this plaintiff? *Union Bank v. Bowman*, 9 La. Ann. 195; *Lapene v. Delaporte*, 27 La. Ann. 252; *Loeb v. Weis*, 64 Ind. 285. The statute of limitations is a good defense. Civil Code La., arts. 1884, 3505; R. S. Mo. 1879, § 3230; *Mitchell v. Cooley*, 5 Rob. 240; *Wiggin v. Flower*, 5 Rob. 414; *Twichel v. Andry*, 6 Rob. 410; *Bell v. Lawson*, 12 Rob. 152.

Wellington Gordon and *Ewing & Hough* for respondent.

Although a mortgage was retained by plaintiff on lands sold by him to R. V. Montague, to secure his notes to plaintiff, this was a transaction had between plaintiff and R. V. Montague, and did not in any way affect the liability of defendant on his written assumption to pay what he owed deceased to plaintiff, nor was this all of the property conveyed by R. V. Montague to defendant and his brothers. No release of the mortgage retained by plaintiff was necessary to fix the liability of defendant, nor was it necessary for any to move from plaintiff to defendant to bind him to pay the obligation, nor was it necessary for plaintiff to accept or adopt said promise, in order to bind defendant. The law presumes he accepted, if made for his benefit, and to overthrow this presumption, a dissent must be shown. *Rogers v. Gosnell*, 58 Mo. 589. The non-delivery and receipt of the property conveyed by R. V. Montague, deceased, to defendant, is no legal defense to plaintiff's action. The authentic act declared on, vested the title to the property conveyed in defendant and his brothers, and the right to reduce the same to possession; and the non-receipt of the consideration constituted no legal defense to the action under the laws of the state where made, nor under the laws of this State. Civil Code of La., arts. 1895, 1944, 1945, 1952, 2231, 2233, 2234, 2242. The contract sued on could not, by parol, and without the knowledge or assent of plaintiff, be rescinded or annulled by agreement between R. V. Montague and defendant and his brothers, and without a re-conveyance of the estate acquired by defendant from R. V. Montague under the contract sued on. *Berly v. Taylor*, 5 Hill 584; *Rogers v. Gosnell*, 58 Mo. 591. The plea of the statute of limitations of the state of Louisiana is no bar to plaintiff's action, as the *lex fori* governs the question of limitation, and said plea, as set up, goes to the original debt and not to the

covenant sued on. *McMerty v. Morrison*, 62 Mo. 140; *Carson v. Hunter*, 46 Mo. 467; *Baker v. Stonebraker*, 36 Mo. 341. Robert V. Montague, who was the obligor in the contract sued on, and with whom defendant contracted to pay plaintiff's debt, being dead, and defendant being a party to the suit and a party to the contract or cause of action in issue and on trial, he was incompetent to testify. *Angell v. Hester*, 64 Mo. 142; *Looker v. Davis*, 47 Mo. 143; *Amonett v. Montague*, 63 Mo. 205; *Stanton v. Ryan*, 41 Mo. 510; *State v. Meagher*, 44 Mo. 356; *Johnson v. Quarles*, 46 Mo. 423; *Byrne v. McDonald*, 1 Allen 293; *Hubbard v. Chapin*, 2 Allen 328; *Granger v. Bassett*, 98 Mass. 462; *Man'f'g Bank v. Scofield*, 39 Vt. 590; *Schwickerath v. Cooksey*, 53 Mo. 82.

Hough, J.—This case is now here on the appeal of the defendants. When it was here before on the appeal of the plaintiff, (63 Mo. 201,) it was decided by this court that the plaintiff was a competent witness, and that parol testimony was admissible to ascertain what debts were intended to be provided for by the stipulation of the defendant and his brothers contained in the contract between them and their father, R. V. Montague.

At the first trial the defendant was not offered as a witness. When the case was remanded, the defendant was offered as a witness, but was not permitted to testify.

When this case was first here, the laws of Louisiana affecting the relations of the parties to the contract sued on, were not in evidence or alluded to in argument. Now, however, they have been properly brought before us, and as the contract was entered into in that state, and with reference to the laws there in force, it must be construed according to those laws. It will be unnecessary to cite the provisions of the civil code offered in evidence. It will be sufficient to refer to the decision of the supreme court of Louisiana in *Mitchell v. Cooley*, 5 Rob. 243. It is there said: "When a person stipulates in a sale that his vendee shall

pay to his vendor a balance of the price yet due, the original vendor, who is thus delegated to receive such amount may, to be sure, be viewed as being *adjectus solutionis gratia.* Not being a party to the contract, he is not bound by the stipulations; and he may continue to look to his own vendee for payment. On the other hand, the parties to the sale may annul and destroy the agreement, but if the person in whose favor such a stipulation is made, consents to avail himself of it, he thereby makes himself a party to the contract, which cannot afterward be revoked without his assent, and he can bring suit to recover the amount thus stipulated in his behalf." The same rule obtains in Ohio, (*Stiner v. Dorman*, 25 Ohio St. 378,) and is perhaps the correct one, though it was otherwise ruled by this court in *Rogers v. Gosnell*, 58 Mo. 589. Such being the relations of the parties to this contract under the laws of Louisiana, the plaintiff cannot be heard to object to the competency of the defendant as a witness, under our statute. *Fulkerson v. Thornton*, 68 Mo. 468.

That portion of the answer which set up a rescission of the contract before the stipulation in favor of the plaintiff was accepted by him, and which also set up a failure of consideration, should not have been stricken out. *Brandon v. Hughes*, 22 La. Ann. 360; *Mitchell v. Cooley*, 5 Rob. 243.

For the reasons given when this case was here before, we are still of opinion that the plaintiff can maintain the present action without joining Hinds, and we see nothing in the sections of the civil code cited, in conflict with this view. It would be absurd to suppose that the intention of the parties in entering into this contract was, that it might, or should, be discharged by the payment of plaintiff's debt to Hinds. R. V. Montague and defendant could hardly have supposed that Amonett would ever accept such a provision made for him as that.

There is nothing in the point that the promise of the defendant and his brothers to pay the debt of plaintiff, was

not an obligation *in solido*. The answer of defendant admits that he was separately bound for the entire amount due plaintiff and Hinds.

The statute of limitations cannot be pleaded in this action to the notes which the defendant promised to pay. If the covenant sued on was not barred when the suit was brought, the plaintiff must prevail, so far as this defense is concerned. This was so decided in the case of the *Succession of Charles Ferguson*, 17 La. Ann. 255, and this is doubtless the rule everywhere.

The judgment will be reversed and the cause remanded. All concur.

CASS COUNTY, *Plaintiff in Error*, v. OLDHAM.

1. **Record of Void Deed.** The record of a deed which is void for insufficiency of description, is not constructive notice, and will not put a stranger upon inquiry.
2. **Purchaser for Value**: MORTGAGE. The giving of further time for the payment of an existing debt is a valuable consideration and is sufficient to support a mortgage as a purchase for a valuable consideration.

Error to Cass Circuit Court.—The case was tried before JOHN F. LAWDER, ESQ., sitting as Special Judge.

AFFIRMED.

C. W. Sloan and *Boggess & Railey* for plaintiff in error.

The omission of the township and range was a mistake of the scrivener; and upon the evidence it is clear that as between Oldham and the county the mortgage was a good equitable mortgage upon the land in township 44, range 32, and as against them the court should have ordered a reformation. *McQuie v. Peay*, 58 Mo. 56; *Davis v. Clay*, 2 Mo. 161; *McClurg v. Phillips*, 49 Mo. 315; 1

Hill. on Mortg., (4 Ed.) 648; *Racouillat v. Sansevain*, 32 Cal. 376; *Carter v. Holman*, 60 Mo. 498; *Blackburn v. Tweedie*, 60 Mo. 505. It was likewise good against Freese, unless he was a mortgagee for value and without notice. He was not a mortgagee for value, because the mortgage was given to secure an antecedent debt. 1 Jones on Mortg., (2 Ed.) § 458; *Aubuchon v. Bender*, 44 Mo. 560; *Bishop v. Schneider*, 46 Mo. 472; *Martin v. Jones*, 72 Mo. 25; *Goodman v. Simonds*, 19 Mo. 106. Neither was he without notice. The mortgage to the county was of record, and though not a perfect mortgage, was sufficient to put him upon inquiry. *Rhodes v. Outcalt*, 48 Mo. 367; *Fellows v. Wise*, 49 Mo. 350; *Smith v. Walser*, 49 Mo. 250; *Major v. Bukley*, 51 Mo. 227; *Cordova v. Hood*, 17 Wall. 1.

Comingo & Slover for defendant in error, Freese.

The county's mortgage was void for uncertainty. The description is fatally defective, in that it fails to show in what township and range the land is situated. *Hardy v. Matthews*, 38 Mo. 121; *Campbell v. Johnson*, 44 Mo. 247; *Vasquez v. Richardson*, 19 Mo. 96; *Holme v. Strautman*, 35 Mo. 293; *Bosworth v. Farenholz*, 3 Iowa 84; *Worthington v. Hylyer*, 4 Mass. 205; *Boyd v. Ellis*, 11 Iowa 97. The record of the county's mortgage did not impart constructive notice. The record of an instrument, if authorized by law, is constructive notice of its actual contents, and nothing more. *Gatewood v. House*, 65 Mo. 663; *Bishop v. Schneider*, 46 Mo. 472; *Terrell v. Andrew Co.*, 44 Mo. 309; *Vaughn v. Tracy*, 22 Mo. 415; *Jennings v. Wood*, 20 Ohio 261; *Leiby v. Wolf*, 10 Ohio 84. Freese is an incumbrancer for value. Though the debt was an antecedent debt, he took a new note for it, payable at nine months. *Boon v. Barnes*, 23 Miss. 136; *Work v. Brayton*, 5 Ind. 396; *Babcock v. Jordan*, 24 Ind. 14; 1 Jones on Mortg., § 459; *Hoggatt v. Wade*, 10 Sm. & M. 143; *Chance v. Mc Whorter*, 26 Ga. 315; Hilliard on Mortg., (3 Ed.) 682; White & Tud. Lead.

Cas. Eq., (3 Am. Ed.) 73; Bigelow on Frauds, 309, 310. The evidence showed that he had no actual notice of the existence of the county's mortgage.

Hough, J.—On the 8th day of February, 1869, John Q. Oldham executed a mortgage to Cass county on lands described as follows: West half of lot 1, northwest quarter section 5, and east half lot 1, northeast section 6. The township and range were both omitted. On April 12th, 1873, Oldham executed a deed of trust on the west half lot 1, northwest quarter section 5, and east half lot 1, northeast quarter section 6, township 44, range 32, in favor of one Henry Freese, to secure the payment of a note therein described, bearing the same date and having nine months to run. In March, 1877, the trustee, in execution of the power conferred upon him, sold the land conveyed by said trust deed, and said Freese became the purchaser. The note executed by Oldham on April 12th, 1873, and secured by the trust deed, was in renewal of a note previously given by Oldham to Freese. The present suit was brought by the county to reform the mortgage given to it, so as to make it state that the land attempted to be conveyed thereby was in township 44 and range 32—the same land conveyed to Freese.

The record of the mortgage to the county was not constructive notice to Freese that the land mortgaged to him had been previously mortgaged to the county. *Campbell v. Johnson*, 44 Mo. 247. There is no evidence that Freese had actual notice of the mortgage to the county, and it would be absurd to say that constructive notice puts a man upon inquiry.

Freese was not only a purchaser without notice, but he was also an incumbrancer for value. "The giving of further time for the payment of an existing debt, by a valid agreement, for any period however short, is a valuable consideration, and is sufficient to support a mortgage

as a purchase for a valuable consideration." Jones on Mortg., § 459. The judgment, which was for the defendant, must, therefore, be affirmed. All concur.

THE STATE v. NATIONS, *Appellant.*

1. **Selling Liquor on Sunday.** The statute against selling liquor on Sunday, (Wag. Stat., p. 504, § 35,) prohibits the sale of "any fermented *or* distilled liquor." An indictment charged defendant with selling "fermented *and* distilled liquor." *Held*, that this was no defect. The object of the statute is to prevent the sale of liquor on Sunday, whether the liquor be fermented or distilled or a mixture of both.
2. **Criminal Statutes**: DISJUNCTIVE: CONJUNCTIVE. When a statute uses the disjunctive in enumerating offenses, it is competent in an indictment to aver their commission conjunctively.
3. **Pleading, Criminal**: SURPLUSAGE IN INDICTMENT. An indictment will not be held defective, if, after striking out the objectionable and immaterial portions as surplusage, enough still remains to constitute a valid and substantial indictment.

Appeal from Bollinger Circuit Court.—HON. J. B. ROBINSON, Judge.

AFFIRMED.

Indictment for selling liquor on Sunday.

Nalle & Smith for appellant.

D. H. McIntyre, Attorney General, for the State.

I.

SHERWOOD, C. J.—The indictment drawn under section 35, 1 Wagner's Statutes, 504, is sufficient, since it pursues the language of the section under which it is drawn. The fact that it charges the sale of "certain fermented *and* dis-

tilled liquors, to-wit: one glass of whisky," does not vitiate the indictment. The violation of the statute is accomplished whenever a sale occurs on Sunday of either "fermented" *or* "distilled" liquors. But it is none the less a violation of the statute if the liquor sold is both fermented and distilled. The gravamen of the offense consists in the sale of liquor on Sunday, whether that liquor be distilled or fermented, or whether it be a liquor composed of a union of each of those kinds. It would be going a great way to hold that a man could go scott-free merely because the liquor he sold on Sunday was not, strictly speaking, an entirely pure article of either of the kinds whose sale is prohibited.

Besides, when the statute uses the disjunctive in enumerating offenses, it is competent to aver their commission conjunctively. *State v. Fancher*, 71 Mo. 460.

Moreover, an indictment will not be held defective, if, after striking out the objectionable and immaterial portions thereof as surplusage, enough still remains to constitute a valid and substantial indictment. *State v. Wall*, 39 Mo. 532.

II.

The motion for new trial, the instructions given and refused, are not incorporated in the bill of exceptions; consequently we are precluded from passing upon any whether occurring at the trial, or in relation thereto. Finding no error in the record proper, we affirm the judgment. All concur.

WINFREY v. WORK *et al.*, *Appellants.*

1. **Partition Sale**: PURCHASER'S RIGHT TO RENTS. A purchaser at partition sale is entitled to possession of the land from the day of sale; or if it be subject to a valid lease or a lease which he might but does not choose to avoid, he will be entitled to the rents from that day; and if the owners have collected them in advance, and that was not known to him when he bought, he will be entitled to a rebate upon his bid to an equal amount.
2. **Actual Occupation,** HOW FAR NOTICE. Actual occupation by a tenant imparts notice of the tenancy and the term, but not of the fact that rent has been paid in advance.

Appeal from Carroll Circuit Court.—HON. E. J. BROADDUS, Judge.

REVERSED.

Jno. L. Mirick for appellants.

Hale & Son for respondent.

HENRY, J.—This is a suit on a note for $266.66, executed by defendants to plaintiff as sheriff of Carroll county. It was given for a part of the purchase money for a tract of land sold by said sheriff in partition proceedings in the probate court of said county. The sale occurred on the 29th day of March, 1877, the date of the note. The answer of defendants, on motion stricken out as not containing facts constituting a defense to the suit, alleged that while said partition proceedings were pending, the adult parties and the guardian of the minor parties to said suit leased said premises for the term of one year from March, 1877, for $150 cash, and received said money from the tenant, and that of this lease and receipt of the rent, defendants, when they purchased the land, were ignorant, and that said leasing and receipt of said rent money, were done by said parties to the partition suit for the purpose of defrauding any purchasers of the land at the partition sale, and

asked that said sum of $150 be allowed them against the note.

We are of the opinion that the court erred in striking out the answer. While there is no warranty of title by the sheriff, or other officer, who conducts such sales and executes deeds to the purchasers, yet the sheriff is but a trustee, and the parties to the partition sale beneficiaries, of the proceeds of the sale; and we see no reason why, if they receive rents to which they are not, and the purchasers are, entitled, the latter may not set this up to diminish the recovery by the amount so wrongfully received by the beneficiaries. No question of warranty of title is involved in the claim made by defendants The sale was made on the 29th day of March, 1877. The note was executed on that day, and from that date defendants were entitled to the possession of the land. *Stevenson v. Hancock*, 72 Mo. 612. If held by a tenant, under a valid lease, they are entitled to the rent from that date to the expiration of the lease. Here the tenant took his lease, *pen dente lite*, and might have been ousted by the purchasers after the 29th day of March. They chose, however, not to molest him, but they are none the less entitled to the amount he paid for rent.

The fact that the tenant was in possession when defendants purchased, imparted no notice to them, except of the relation in which the tenant stood, as such occupant, to the owner. It imparted notice that he was a tenant for a year, but not that he had or had not paid his rent. The beneficiaries of the note sued on, have received $150 to which defendants are entitled, and they should be allowed a deduction of that amount from what is due on the note. Judgment reversed and cause remanded.

ANDERSON, *Appellant*, v. THE TOWNSHIP BOARD OF MYRTLE TOWNSHIP.

1. **Appeals in Road Openings**: PRACTICE IN SUPREME COURT. This court cannot pronounce upon the legality of a proceeding for the opening of a road begun before a township board and brought thence by successive appeals through the county and circuit courts, unless the proceedings before the township board are incorporated in the record.
2. ——: DESCRIPTION OF ROUTE. A judgment of the circuit court affirming an order of the county court for the opening of a road, made the road terminate in section 36, instead of section 26 as stated in the order of the county court. The call for section 26 was a patent mistake. *Held*, that the circuit court had the undoubted right to make the correction.

Appeal from Adair Circuit Court.—HON. J. W. HENRY, Judge.

AFFIRMED.

James Ellison for appellant.

W. R. McQoid and *E. V. Wilson* for respondent.

HOUGH, J.—This is an appeal from certain proceedings instituted before the township board of Myrtle township, Knox county, under the act of March 24th, 1873, in relation to township organization, for the purpose of establishing a public road in said township. On appeal to the county court it was adjudged by that tribunal that the road sought to be established was of public utility, and that it be declared a public highway, as follows: "Beginning at the northwest corner of section 35 and the southwest corner of section 26, and running thence east on the section line between said sections 35 and 26 one mile, at which point it reaches and comes to the northwest corner of section 36 and the southwest corner of section 25, and to continue from said corner of sections 36 and 25 east on the section line between said sections 36 and 25 one mile,

terminating at the northeast corner of section 26, where it intersects the road running north and south on the county line between Lewis and Knox counties; all of said road in township 62, range 10—the road to be forty feet wide; and that Alexander Anderson, plaintiff, be allowed damages in the sum of $30, after making due allowance for the advantages and disadvantages of said road to him; and that the action of the township board in the location of the road is hereby affirmed." On appeal to the circuit court, the judgment of the county court was affirmed, and said road was established as follows: "Commencing at the northwest corner of section 35 and the southwest corner of section 26, and running thence east on the section line between said sections 35 and 26, one mile, at which point it reaches and comes to the northwest corner of section 36 and the southwest corner of section 25, and to continue from said corners of said sections 36 and 25 east on the section line between said sections 36 and 25 one mile—said road to terminate at the northeast corner of section 36 and the southeast corner of section 25 where it intersects with the road running north and south on the county line between Knox and Lewis counties; all of said land over which said described road is to pass is situated in township 62, range 10 west, in Knox county, State of Missouri. And the court finds from the record in this cause that the plaintiff has sustained damages in the location and establishment of said road as allowed by the county court in the sum of $—. It is, therefore, ordered and adjudged by the court that the plaintiff have and recover off of the defendant, Myrtle township, Knox county, Missouri, said sum of $—, and on the payment of the same to plaintiff it is ordered that said road be opened, and on failure of plaintiff to open the same that the defendant have its lawful process and proceedings to open and establish the same. It is further ordered and adjudged that the defendant have and recover its costs laid out and expended in this cause, and that defendant have its execution for the same."

The law regulating appeals in cases like the present provides that when the appeal is perfected the clerk of the township shall make out a full transcript of all proceedings before the township board, and file the same, together with all original papers in the proceeding, with the clerk of the county court. The statute further provides that "the county court shall, at their first regular meeting thereafter, proceed to hear and determine all matters of dispute in said proceedings, and shall make an order in said cause which shall be final as to all matters involved in said proceedings, saving to all land owners through whose land said road may run and who may not have given the right of way, the right to appeal to the circuit court of said county on all questions of law involving the legality of said proceedings, but on such appeal no evidence as to the utility of said proposed road shall be received, but the action of the county court as to its utility shall be final. The action of the county court as to the laying out, change or vacation of public roads, and all questions as to damages shall be final, saving the right of appeal as hereinbefore provided to the circuit court." Acts 1874, p. 196.

The proceedings before the township board are not to be found in the record before us, and it is, therefore, impossible for us to say that there was any illegality in said proceedings.

The judgment of the circuit court corrects a patent mistake in the judgment of the county court, by making the road established terminate at the northeast corner of section 36, where the description of the road shows it terminates, instead of the northeast corner of section 26, as stated in the judgment of the county court, and this correction it had the undoubted right to make. The judgment of the circuit court will be affirmed. The other judges concur.

The judgments in two other cases, *Roberts v. The Township Board of Myrtle Township*, and *Wm. H. Anderson v. The Same*, were affirmed at the same time and for the same reason as in the foregoing case.

STANLEY, *Appellant*, v. BAKER.

Homestead. Defendant, with the purpose of making it his homestead, acquired title to a tract of land by deed recorded before plaintiff's debt was contracted. After the debt was contracted, defendant sold a homestead which was exempt from execution, and with the proceeds erected a dwelling house on the land and used it as a homestead. *Held*, that as against the plaintiff's debt the new homestead was not exempt from execution. Wag. Stat., pp. 698, 699, §§ 7, 8.

Appeal from Schuyler Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

Higbee & Shelton for appellant.

The 160 acres was not Baker's homestead in 1873, when plaintiff took his note. It did not become his homestead till 1876. He cannot, therefore, claim it as exempt from plaintiff's debt. Wag. Stat., pp. 697, 698, §§ 1, 7; Freeman Executions, § 241; Herman Executions, 125; 1 Am. L. R., (N. S.) 649, 650, 651, note 1; Thompson Homesteads, §§ 240, 244, 246. His intention to make it his home in the future coupled with improvements will not avail him. *Hansford v. Holden*, 14 Bush 210; *s. c.*, 7 Reporter 177. He is not entitled under either section 7 or 8. The homestead is a statutory right, and equitable principles other than those recognized by the act cannot be invoked. *Casebolt v. Donaldson*, 67 Mo. 308. The homestead consists of the dwelling house and land used in connection therewith. There must be actual residence under a recorded title, before the land is impressed with the character of homestead. When the debt due plaintiff was contracted, Baker's homestead was in Lancaster, and it is clear that he could not have claimed the land as a homestead then against plaintiff's demand, nor could he up to the time he sold his homestead in Lancaster in 1876. He had no

dwelling house on the 160 acres, and had never resided there. If he is entitled to claim it now, he must make out his claim under the homestead act and show that he had acquired this land as a homestead before the debt was contracted, or that it was obtained by the proceeds of a former homestead.

James Raley for respondent.

The filing of the deed is the time from which the homestead right begins. *Shindler v. Givens*, 63 Mo. 394; *West River Bank v. Gale*, 42 Vt. 27; *Lamb v. Mason*, 45 Vt. 500.

HENRY, J.—The question to be determined is, whether John Baker, on the following facts, is entitled to a homestead in a tract of land in Schuyler county, exempt from execution on a judgment in favor of appellant against said Baker and others. The agreed facts are as follows:

From 1866 to 1876 Baker was the owner in fee of several lots in the town of Lancaster, Schuyler county, upon which his dwelling house was situated, in which he resided with his family during that period. His deed to that property was filed for record April 28th, 1866. In 1869 he purchased 210 acres of land, in Schuyler county, near the town of Lancaster, of which the land now claimed as a homestead is a part, and his deed thereto was recorded in 1869. In 1876 he sold his residence property in Lancaster for $1,300, which in the same year he expended in the erection of a dwelling house on the land in controversy, and has resided there since 1876, with his family. The 160 acres claimed as a homestead does not exceed in value $1,500. It was enhanced in value about $500 by the erection of said dwelling house, and the land claimed is all used in connection with said dwelling house as a homestead, and is improved and cultivated. Plaintiff's demand against Baker consists of two promissory notes for $300

each, dated February 6th, 1873, on which judgment was rendered in March, 1877, and execution issued on said judgment July 1st, 1878. Baker testified that he purchased and improved said land with the expectation of making his home there and always expected to move upon it as his home.

Our homestead act is not free from ambiguity, and it is to be regretted that the language employed in sections 7 and 8 is not more exact. Still we are of the opinion that no reasonable construction of those sections gives Baker a homestead in the tract of land in controversy, exempt from execution issued on plaintiff's judgment. The homestead secured to the head of a family, is by section 7, subject to attachment and levy of execution upon all causes of action existing at the time such homestead was acquired, "and such time shall be the date of the filing, in the proper office for the records of deeds, the deed for such homestead." Section 8 provides that another homestead may be acquired, which shall not be liable for any debts to which such prior homestead would not have been liable; provided it shall have been acquired with the consideration derived from the sale or other disposition of such prior homestead. In other words, it authorizes one to sell or dispose of a homestead, exempt from a given debt or debts, and acquire another with the proceeds of the former, which shall also be exempt from such debt or debts.

It cannot be controverted, that the land in question, at any time before Baker erected his dwelling house upon it and moved into it, was subject to attachment and levy of execution for the demand of the appellant. That demand originated in 1873. Baker's house was erected on the land in 1876. In 1873 he had a homestead in Lancaster. He could not have two at the same time. His intention when he purchased the land in controversy, to make it his home, is wholly immaterial. His homestead in the town of Lancaster was not subject to levy of execution on plaintiff's cause of action, but the land in controversy, by

the express terms of section 8, is not exempt, unless it was acquired as a homestead with the consideration derived from the sale or disposition of such prior homestead, and by the agreed facts, Baker owned the land long prior to the sale of his homestead in Lancaster, no portion of the proceeds of which was used in acquiring the land. That the money received on the sale of the Lancaster property was expended in the erection of the dwelling on the land is not sufficient to create an exemption against plaintiff's demand. *Farra v. Quigley*, 57 Mo. 286. The $1,300 so expended enhanced the value of the land only $500. It was a poor investment, and it seems a hardship that Baker should have given up his former homestead, exempt from this debt, without acquiring another equally exempt from it, after expending all that he received on the sale of the prior homestead in improvements upon this land, but such is the provision of the statute, as heretofore construed by this court, and however obscure the language of the statute may be in other respects, it clearly enough provides that a homestead acquired by one who previously had another, in order to be subject only to such debts as could have been enforced against the former, must be acquired with what was derived from the sale or other disposition of the former. The sheriff made a levy of an execution, issued on plaintiff's judgment, on the land in question, which, on motion of Baker, was quashed. In this we think the court erred, and the judgment is reversed and the cause remanded. All concur.

GANSNER *et al.*, *Plaintiffs in Error*, v. FRANKS.

Set-off. A debt due to a defendant as guardian cannot be set off against a demand due by him individually.

Error to Jefferson Circuit Court.—HON. LOUIS F. DINNING, Judge.

REVERSED.

Philip Pipkin for plaintiffs in error.

HOUGH, J.—The plaintiffs sue the defendant upon a lease executed to him by Catherine Gansner, before her marriage with her co-plaintiff, and while she was the widow of one Christopher Frank. After the defendant went into the possession of the premises leased to him, he became guardian of four children of said Christopher Frank by a former marriage. The defendant contends that a portion of the rent which he covenanted to pay, of right belongs to said children, and that being their guardian, he has a right to retain the same for their use and benefit. The court allowed the defendant the amount claimed by him, in his capacity as guardian, out of the rent due from him individually to the plaintiffs under his lease from Mrs. Gansner, and rendered judgment in favor of the plaintiffs for the balance. In this the circuit court committed error. Conceding that under the circumstances of this case, which it is unnecessary to recite, the children were entitled to a portion of the rents, the defendant was not entitled to set-off against a demand due by him individually, a sum alleged to be due him as guardian. The judgment will, therefore, be reversed and the cause remanded. The other judges concur.

HUBBARD *et al.*, *Plaintiffs in Error*, v. BURTON.

Contract to Cut and Remove Timber: MEANING OF THE WORD "TIMBER:" REASONABLE TIME. Plaintiffs' assignor contracted for the right to enter upon defendant's land and "cut all the white-oak, burr-oak, spanish-oak, elm and walnut that is upon said land, and remove said timber within twelve months. * * All of said timber not removed from said land within twelve months, whether cut or standing, is to be the property of" the defendant. The contract did not say for what purpose the timber was to be cut. *Held*, that the term "timber," as used in the last clause of the contract, meant trees standing, or felled and lying in their natural state upon the land, and did not include railroad ties made out of the trees; and that plaintiffs were entitled to a reasonable time after the expiration of the twelve months to remove these.

Error to Monroe Circuit Court.—HON. JOHN T. REDD, Judge.

REVERSED.

Chas. A. Winslow for plaintiff in error.

A. M. Alexander for defendant in error.

HENRY, J.—This is an action for possession of 1,410 railroad ties alleged to be of the value of $300, which, plaintiffs charge, are unlawfully detained from them by defendants. Plaintiffs are partners, and defendants, husband and wife. On affidavit and bond, etc, as provided by the statute, the ties were delivered to plaintiffs. The cause was submitted to the court on an agreed statement, and defendants obtained a judgment. Plaintiffs have brought the cause here on writ of error.

The controversy arose upon the following contract executed by Mary J. Burton, then Mary J. Alexander, and one Lewis Jeffries: "This memorandum witnesseth the following agreement between Mary J. Alexander, of the first part, and Lewis Jeffries, of the second part: The said Mary J. Alexander has this day agreed that the said Lewis Jeffries may enter upon her land, being ninety acres of the

farm of Gabriel Alexander, deceased, and the portion allotted to her in the partition of said deceased's lands, and cut all of the white-oak, burr-oak, spanish-oak, elm and walnut that is upon said land, and remove said timber, within twelve months from this date, for which said Jeffries has paid her cash in hand $300, and is to pay her $100 on or before the 7th day of July, 1876, and to execute his note to her for the sum of $175, payable on the 1st day of September, 1876, with good security. It is further agreed that if said $100 is not paid on the 7th day of July, 1876, the said Jeffries shall not have the right to remove any timber from said lands, until he shall pay said sum of $100. All of said timber not removed from said land within twelve months, whether cut or standing, is to be the property of the said Mary J. Alexander.

Witness our hands on the 7th day of June, 1876."

Statement following above contract: "And that on the 22nd day of June, 1876, Jeffries sold under contract hereinafter set out, to plaintiffs, all ties then made on said land under said contract, and all thereafter to be made, and that the ties sued for were made within one year from and after the date of said contract, but remained on the land after that time, and were on the land at the institution of this suit."

Contract between Lewis Jeffries and Hubbard & Plank as follows:

MOBERLY, Mo., June 22nd, 1876.

This is to certify that we have this day bought of Lewis Jeffries, 8,000, with the privilege of 10,000, railroad cross-ties, at the following prices: For first-class, 33 cents, second-class, 22 cents, per tie, specification as follows: Made of good sound tie timber of such kinds as will be received by the Missouri, Kansas & Texas Railroad Company on this division, made according to their specifications, said ties to be delivered between Evansville and Madison, on the line of their road, on or above grade, piled

up according to the company's instructions; payments to be made on or before the 25th of each month; said ties to be all delivered between this date and the 1st day of January next.

HUBBARD & PLANK.

The piling to be delivered and loaded on the cars at ten cents per foot, of such specifications as will be received by the road.

HUBBARD & PLANK.

Statement following above contract, as follows: "That this contract was varied so that Jeffries could deliver the ties on the land, and that Hubbard & Plank so agreed and hauled part of the ties away."

The only question which it is necessary to determine relates to the proper construction of the contract between Miss Alexander and Jeffries: "All of the timber not removed from said land within twelve months, whether cut or standing, is to be the property of the said Mary J. Alexander."

We have no doubt that any trees standing, or felled, and lying in their natural state upon the land, after the expiration of twelve months from the date of the contract, would belong to the vendor. But does the term "timber" embrace articles manufactured out of the timber? Suppose instead of purchasing the timber for the purpose of making railroad ties, the object of the purchaser had been to manufacture barrels, buckets or shingles, would defendant have been entitled to all such manufactured articles found upon the premises, after the expiration of the specified time? It is evident, that the object of inserting that provision in the contract, was to avoid conferring upon the purchaser a right, indefinite as to time, to enter upon the land and cut down the timber—to limit the right to cut and remove the timber, or work it up, after the lapse of twelve months. We think the fair and reasonable construction of the contract is, that only the timber standing, or cut and lying upon the ground in its natural state, was

forfeited to defendants. *Wetherbee v. Green*, 22 Mich. 315; *s. c.*, 7 Am. Rep. 653. This construction accomplishes what may fairly be considered defendant's purpose in having the stipulation under consideration embodied in the contract. The court tried the case on a different theory. The owners of the ties are entitled to a reasonable time after the expiration of the twelve months, within which to remove the ties. The judgment is reversed and the cause remanded. All concur.

SIMS' ADMINISTRATOR v. KELSAY, *Appellant.*

1. **Unlawful Detainer,** NO ALLOWANCE FOR IMPROVEMENTS. The law does not authorize the allowance of compensation for improvements in the action of unlawful detainer, and the court has no power to entertain a petition for such allowance, even by consent of parties.
2. ——: ——: EXECUTION. After a judgment for plaintiff in unlawful detainer, defendant filed a supplemental petition praying allowance of improvements, whereupon the court ordered a stay of execution, with leave to plaintiff to answer the petition before the next term. At the next term, instead of answering the petition the plaintiff moved for execution, and the court granted the motion. *Held*, that there was no error in this, 1st, because the order for a stay was void. 2nd, because it had expired when the execution was ordered.
3. ——: EXECUTION: PROPER PARTY. Where the plaintiff in an action of unlawful detainer dies leaving a judgment for possession and damages unsatisfied as to the damages, execution properly issues in the name of the administrator, not of the heir.
4. **Practice in Supreme Court.** Allegations contained in a motion unsupported by evidence, cannot be received on appeal as true.

Appeal from Morgan Circuit Court.—HON. G. W. MILLER, Judge.

AFFIRMED.

Mrs. Evaline U. McCoy, claiming title to a house and lot in Versailles, Morgan county, let the same to defendant John B. Kelsay, who immediately went into possession. Shortly thereafter John Sims, then administrator of the estate of John C. McCoy, the deceased husband of Mrs. E. U. McCoy, offered the same premises for sale as part of the estate of the deceased, and Kelsay became the purchaser; and afterward refused to pay rent for the premises. Thereupon Mrs. McCoy brought this suit, an action of unlawful detainer, and obtained judgment before the justice of the peace for possession of the premises and for damages, and on appeal to the circuit court, at the April term, 1878, again obtained judgment there. Defendant filed his motion for new trial, which was immediately overruled. At the same term he filed his petition for allowance of improvements, set out in the opinion, verified by his own affidavit, and the case was continued to the next term. Shortly thereafter Mrs. McCoy died, and Sims was appointed her administrator also. Sims filed no answer to defendant's petition, but instead, at the October term, 1878, moved for execution upon the judgment, and the court granted the motion. Defendant moved to set aside this last order; but the motion was overruled, and at the same term defendant took this appeal.

A. W. Anthony for appellant.

Draffen & Williams and *T. M. Rice* and *B. R. Richardson* for respondent.

SHERWOOD, C. J.—No appeal was taken from the judgment rendered at the April term, 1878, and on the 3rd day of April, in favor of Evaline U. McCoy, for possession of the premises, and for damages for the detention thereof. After judgment rendered, and after the term had passed, the defendant, as the record recites, in pursuance of the judgment, voluntarily surrendered possession of the prem-

ises to Evaline U. McCoy, but failed to pay the damages assessed; that subsequently John Sims, the present plaintiff, was appointed and qualified as her administrator.

At the October term, 1878, the administrator moved the court that execution issue in his favor, as such administrator, for the damages, etc., assessed. This motion was granted, notwithstanding the objections of the defendant, who afterward offered to file a motion to set aside the order for the issuance of execution. Permission to file this motion was refused. In support of this motion he offered in evidence a record entry, made at the April term, and after the rendition of judgment, in these words:

"MORGAN CIRCUIT COURT, APRIL TERM, 1878, April 9th.
Evaline U. McCoy, plaintiff,

v.

John B. Kelsay, defendant.

Now, at this day, comes the defendant, by his attorney, and by leave of the court files his petition for improvements made on the premises sued for in this cause, and he asks the court for stay of execution, as to damages recovered against him.

And thereupon, by consent of plaintiff's attorney, a stay of execution as to damages, is granted by the court and leave is granted plaintiff to answer petition for improvements, sixty days before next term."

The foregoing entry was made upon the filing of the following petition:

"IN THE CIRCUIT COURT OF MORGAN COUNTY,
April Term, 1878.

Evaline U. McCoy, plaintiff,

v.

John B. Kelsay, defendant.

Defendant states to the court that after he entered into the possession of the premises claimed by the plaintiff in her petition, the same were sold by John Sims, as administrator of the estate of John C. McCoy, and defendant pur-

chased and paid for the same, and received a deed therefor from said administrator; that the defendant was, by the declarations of said plaintiff, induced to believe, and did believe at the time of his said purchase, that he acquired thereby good title to the said property, as against the plaintiff, and so believing and relying on the declarations of the plaintiff, defendant has made, on said premises, lasting and valuable improvements, which are of the value of $200 or more; that plaintiff is wholly insolvent, and that if defendant is compelled to pay the damages awarded against him by the jury in this cause, he is without remedy and will lose the value of said improvements. Wherefore he prays the court to grant him a stay of execution as to the damages rendered, until inquiry can be had as to the value of said improvements, and that the defendant have judgment therefor, and that the amount be offset against plaintiff's recovery, and for all other proper relief in the premises."

I.

The statutory provisions giving compensation for improvements do not apply to the action of unlawful detainer, but only to that of ejectment. R. S. 1879, p. 377, § 2259. The Morgan circuit court had no jurisdiction to make the entry of April the 9th, and its act in that regard must be deemed *coram non judice*. Besides, there had been, so far as concerned that court, a final disposition of the cause by judgment rendered, from which no appeal was taken. And it is very clear that the alleged consent of the former plaintiff, as shown by the entry referred to, could not confer jurisdiction when none existed before. *Stone v. Corbett*, 20 Mo. 350; *Lindell's Adm'r v. Railway*, 36 Mo. 543; *Dodson, Adm'r, v. Scroggs, Adm'r*, 47 Mo. 285; *Cones v. Ward*, 47 Mo. 289. A special statutory authority and jurisdiction, such as that conferred on the circuit court by the section aforesaid of the ejectment act, can neither be en-

larged nor extended to cases other than those for which particular provision is made therein.

As the entry made at the April term was made without any warrant of law, as no right or jurisdiction existed to make it, the court very properly disregarded it, at the October term when ordering execution to issue in favor of the administrator for damages, etc., the remainder of the judgment having been satisfied and complied with, by the defendant voluntarily surrendering possession of the premises to the plaintiff. At all events, the stay of execution was not designed to last longer than the October term, even if the order granting the stay was valid and binding, and that time had expired prior to the order for the issuance of execution.

And the execution "concerning the personalty" was properly ordered to issue in the name of the plaintiff as administrator. 1 R. S. 1879, § 2742; *Gaston v. White*, 46 Mo. 486.

III.

A good deal has been said about the equities of the defendant. We have no evidence of the truth of the allegations of the defendant's petition. Nor can the statements made in the motion the defendant offered to file to set aside the order that execution issue, be received as any evidence of the truth of the matter therein set forth. This is well settled. We make no ruling, however, on any equitable rights defendant may have, as this, in the state of this record, would be improper for us to do. Judgment affirmed. All concur.

GOODWIN v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Appellant.*

1. **Negligence**: INSTRUCTIONS. In a common law action for a negligent injury, the court should instruct the jury what facts, if found, will amount to negligence, and not leave them to determine that for themselves.
2. **Railroad**: NEGLECT OF STATUTORY DUTY: PLEADING: EVIDENCE. The omission to discharge any duty imposed by law upon common carriers in the management of their vehicles, in transporting persons and property, is negligence. The fact, therefore, that a railroad company's train men failed to ring the bell or sound the whistle as the train approached the crossing of a public road, may be given in evidence in a common law action against the company for negligently killing plaintiff's steer at the crossing, without being specially pleaded. If the action were on the statute, (Wag. Stat., p. 310, § 38,) it would be otherwise.
3. ———: NEGLIGENCE: SPEED OF TRAINS. It is not negligence *per se* to run a train at the rate of twenty-five miles an hour across a public road in the country.

Appeal from Daviess Circuit Court.—HON. S. A. RICHARDSON, Judge.

REVERSED.

Shanklin, Low & McDougal for appellant.

Gillihan & Brosius for respondent.

HENRY, J.—This suit was commenced before a justice of the peace, to recover damages for the killing of a steer belonging to plaintiff, by a train of defendant's cars, at the crossing of a public highway in Daviess county, occasioned, it is alleged in the statement, by the carelessness and negligence of defendant's servants, in managing and running the locomotive and cars. The fact that the steer was killed at said crossing by the train, is not controverted, and the evidence for plaintiff tended to prove that the train was running about twenty-five miles an hour, and that the bell on the locomotive was not rung, nor the whistle blown, as

required by section 38, Wagner's Statutes, page 310. The defendant's evidence was to the effect, that the train was running at the usual speed; that the bell was rung, and the whistle blown, as required by section 38; that the engineer first saw the steer when the locomotive was about eighty yards from the crossing, and just as he stepped upon the track, and that the train could not then have been stopped in time to avoid striking him. On cross-examination, the engineer was permitted, against defendant's objection, to testify, that if the train had been running only fifteen miles an hour, it could have been stopped, after he first saw the steer, and the accident avoided. The evidence also showed, that the train was stopped about 100 yards east of the crossing after the steer was struck.

The court, for plaintiff, gave the following instruction, of which defendant complains: "If the jury believe from the evidence that by the carelessness or negligence of the agents or employes of defendant in the operation of their locomotive engine and cars, plaintiff's steer was run against and killed by said locomotive engine or cars, they will find for plaintiff the value of said steer."

For defendant, the following was given: 6. "Unless the jury believe from the evidence that the employes of defendant in charge of the train in proof were guilty of some act or acts of negligence in running the train at the time of the injury, and that the injury resulted directly from such negligence, the jury ought to find for defendant."

The following, asked by defendant, were refused: 1. "Under the complaint and evidence in this case, the plaintiff cannot recover; hence the jury will find for the defendant."

4. "Under the complaint in this case, the jury will exclude from their consideration all evidence tending to prove a failure to ring the bell or sound the whistle by the men in charge of the train which struck plaintiff's steer."

5. "The jury ought to find for plaintiff in this case,

unless they believe from a preponderance of the evidence that defendant's agents or servants in charge of the train were guilty of some acts of negligence other than failing to ring the bell or sound the whistle, and that the steer was struck and injured by reason of such negligence."

7. "The running of the train at the place of injury at the rate of twenty-five miles an hour does not constitute negligence under our law."

8. "Outside of cities and towns the law does not prescribe the rate of speed of railroad trains at public railroad crossings."

9. "To entitle plaintiff to recover on the ground of negligence, it is not enough for plaintiff to prove the negligence alone, but the jury must believe from the evidence that there was negligence on the part of defendant's employes, and that such negligence directly contributed to the injury."

Plaintiff obtained a judgment, from which defendant has appealed.

The instruction given for plaintiff is rather too general, as a guide to a jury in such a case. The court should have declared what facts, which the evidence tended to prove, would amount to negligence, and told the jury, if they found those facts, and that the injury was occasioned by such negligence, their verdict should be for plaintiff.

1. NEGLIGENCE: instructions.

The first asked by defendant was properly refused. There was evidence tending to prove the allegations in the statement.

The fourth asked was also objectionable. This is not a suit on the section which requires the bell to be rung, or the whistle to be blown on a locomotive, as it approaches a public crossing, and imposes a penalty for every neglect of such duty, and makes the corporation liable for all damages sustained by any person by reason of such neglect. Wag. Stat., § 38, p. 310. In an action, based on that section, the neglect of

2. RAILROAD: neglect of statutory duty: pleading: evidence.

the duty imposed thereby must be specifically averred; but in a common law action for an injury sustained in consequence of the negligent manner in which a train was run, under the general allegation of negligence and carelessness, in a suit by a stranger against the company, evidence of a failure to comply with the requirements of that section, is admissible. The omission to discharge any duty imposed by law upon common carriers, in the management of their vehicles, in transporting persons and property, is evidence of negligence, but of course would not warrant a verdict, in a suit against the carrier on account of injuries not caused by such omission of duty. Where nothing is shown, in an action based upon the section above referred to, except the omission of the duty enjoined, and the injury, it has been held by this court, that it is the duty of the trial court to declare, as a matter of law, that the plaintiff cannot recover. *Stoneman v. Atlantic & Pacific R. R. Co.*, 58 Mo. 503; *Holman v. Chicago, Rock Island & Pacific R. R. Co.*, 62 Mo. 562. In the case at bar, however, other facts did appear, which justified its submission to the jury. The steer was not fastened, or in any manner confined, or unable to escape, if the signals had been given. The engineer on the locomotive saw it step upon the track. These facts are sufficient to distinguish this from the cases above cited. The evidence of the neglect to comply with the injunctions of that section, was, therefore, admissible, and it was a question for the jury whether that omission occasioned the injury. For the foregoing reasons, there was no error in refusing defendant's' fifth. It declares in effect, that although the bell was not rung, nor the whistle blown, and this was the cause of the injury, yet plaintiff could not recover.

The court erred in refusing the 7th and 8th asked by defendant. *Maher v. A. & P. R. R. Co.*, 64 Mo. 275; Shearman & Redf. on Neg., § 478. The refusal of these instructions, and the admission of the testimony of the engineer, on his cross-examination, were

3. ——: negligence: speed of trains.

errors, which indicate the view of the court to have been, that the speed of the train was, of itself, negligence, which authorized a recovery, and under the same erroneous impression, made on the minds of the jury, by the action of the court, their verdict may have been rendered.

The defendant's 9th, which was refused, was substantially embraced in the instruction given for defendant, numbered 6.

The judgment is reversed and the cause remanded. All concur.

SHERLOCK v. KIMMELL, *Appellant.*

1. **Infancy**: PARENT AND CHILD: CONTRACT OF HIRING: MEASURE OF DAMAGES. If a minor son hire himself out without the knowledge of his father, the father may either adopt the contract and claim whatever is due under it, or he may repudiate it and claim the value of his son's services. In the latter event, if it appears that the employer has permitted the son to use a part of his time for his own purposes, the measure of recovery will be the value of his entire time, less the value of the privilege so accorded to him.
2. ——: ——: ——. If a father hire out his minor son for an indefinite period, the employer may discharge the son at any time without notice to the father
3. ——: ——: EVIDENCE. In an action by a father to recover wages due his minor son, statements made by the son are not admissible as evidence against the father.

Appeal from Jackson Special Law and Equity Court.—HON. R. E. COWAN, Judge.

REVERSED.

Tomlinson & Ross and *J. T. Dew* for appellant, cited *Kirk v. Hartman*, 63 Pa. St. 97; *Coffin v. Landis*, 46 Pa. St. 426; *Swartz v. Hazlett*, 8 Cal. 124; *Perlinau v. Phelps*, 25 Vt. 478; *N. & C. R. R. Co. v. Elliott*, 1 Cold. (Tenn.) 611;

McCoy v. Huffman, 8 Cow. 84; *Weeks v. Holmes*, 12 Cush. 215.

Wm. E. Sheffield for respondent.

HOUGH, J.—This action was originally instituted before a justice of the peace on the following account:

ABRAM KIMMELL,

In account with JOSEPH SHERLOCK:

To amount due Victor for services in store from the 1st of June, 1874, to 1st of September, 1876, at $25 per month .		$675.00
To amount due me for services and commissions		62.00
To overcharge in your account . . .		10.00
		$737.00
Credit by contra account:		
By music, etc., to me	$ 91.06	
By music, etc., to Georgiana . .	4.90	
By cash, etc., to Victor . . .	468.05	564.02
Balance due me		$172.98

The point in controversy is as to the right of the plaintiff to recover the sum claimed for the services of his son, who was a minor. It appears from the record that the defendant, by a contract with the plaintiff, engaged plaintiff's son to serve him as clerk from June 1st, 1874, at $25 per month. The plaintiff testified that the employment was for no definite period. The defendant testified that it was for one year. The plaintiff and his son both testified that the son remained in the defendant's service continuously, under the contract mentioned, from the 1st day of June, 1874, to the 1st day of September, 1876. About the expiration of a year, according to the testimony of the defendant and another witness, the defendant's property was seized under execution and his place of busi-

ness was closed, and defendant then informed plaintiff's son that he would need his services no longer. The defendant testified that his store remained closed about sixty days, when he again took plaintiff's son into his service, agreeing with him, that he would give him $15 per month, and allowing him to employ a portion of his time in giving lessons in music. A witness for the defendant testified that after defendant resumed business, plaintiff's son told him that he was getting $15 per month, and had the privilege of giving music lessons, and that he was thereby making $40 per month. This testimony was objected to on the ground that the statements of plaintiff's son were not binding upon plaintiff, as it did not appear that plaintiff had any knowledge of them.

The following instruction, asked by the plaintiff, was given by the court: "The defendant could make no new contract with the minor son of plaintiff with regard to the amount of pay he was to receive for his services without the knowledge or consent of plaintiff, which would bind plaintiff."

The following instructions, asked by the defendant, were refused: 1. "If Victor Sherlock was discharged by defendant and afterward re-employed at a different salary, the plaintiff is not entitled to recover, unless it appears that there is something due upon the new contract."

2. "Defendant was not bound to keep Sherlock, Jr., in his employ for more than the year for which he was first employed, and had a right to make a new contract with him, Sherlock, Jr., after he had discharged him." The court rendered judgment against the defendant for the full amount claimed by plaintiff.

Under the contract, as the plaintiff stated it, the defendant had an undoubted right to discharge the plaintiff's son whenever he saw fit, and under the contract, as stated by the defendant, he had a right to discharge him at the end of the year. If the defendant did discharge plaintiff's son, as he and

1. INFANCY: parent and child: contract of hiring: measure of damages.

one other witness testified he did, a the end of the year, such discharge, of course, terminated the contract for $25 per month, and if plaintiff's son was again employed at $15 per month, with the privilege before stated, then the plaintiff, unless he had knowledge of such contract and acquiesced in it, had his option either to adopt the contract and claim whatever was due under it, or to repudiate the contract and claim the value of his son's services. In the latter event, he would be entitled to the value of his entire time, less the value of the privilege accorded him of giving music lessons. *Huntoon v. Hazelton*, 20 N. H. 388.

The declaration of law given at the request of the plaintiff is abstractly correct, but it does not set forth any ground of recovery on the facts in evidence. It ignores the right of defendant to discharge plaintiff's son, and it seems to have been asked and given upon the theory that having made a contract with plaintiff at $25 per month, he could not terminate it without his knowledge or consent.

2. ——: ——: ——.

The two instructions asked by defendant were properly refused. The declarations of the son were inadmissible as original evidence, though they might have been used to contradict him, if the proper foundation had been laid.

3. ——: ——: evidence.

The case does not seem to have been tried upon correct principles, and the judgment will be reversed and the cause remanded

There is a manifest error in the account which can be corrected on a new trial.

The other judges concur.

BOYER v. AUSTIN, *Plaintiff in Error.*

Vendor's Lien, Waived by Taking Independent Security. Where the vendor of land conveys the title and takes as security for the purchase money the obligations of a third party, in the absence of any agreement to the contrary, he will be deemed to have waived his vendor's lien, and it does not matter that the securities so taken are worthless.

Error to Henry Circuit Court.—HON. F. P. WRIGHT, Judge.

REVERSED.

Philips & Jackson for plaintiff in error.

F. P. Wright and *M. A. Fyke* for defendant in error.

HENRY, J.—This suit is to recover of defendant $3,570 and interest on a promissory note executed by defendant to plaintiff, and to enforce a vendor's lien for the amount against certain land in Henry county purchased by defendant of plaintiff, the note in suit having been given for part of the purchase money. Plaintiff conveyed the land to defendant by a general warranty deed, and took from him as collateral security, four $1,000 bonds of the Hudson & St. Lawrence Railroad Company, payable at the office of the company in New York City, on January 1st 1893, with seven per cent interest from January 1st, 1873. The subject of a vendor's lien was not mentioned between the parties. Plaintiff testified that about two months after he received the bonds, he asked Tyler, cashier of a bank at Clinton, Missouri, about the bonds, and was informed by him that they were worthless, but that plaintiff had never made an effort to collect the interest due on them, and had never by letter, or otherwise, made inquiry in New York to ascertain their character. Defendant offered to show that he had conveyed the land in question, by deed, as security for a sum of money borrowed by him, and that the land was sold under the deed of trust, and purchased

by Salmon & Salmon, of Henry county, Missouri. The court sustained an objection to this testimony, and this was all that was offered by defendant. Plaintiff had a judgment, as prayed in his petition, and defendant has brought the cause here on writ of error.

In *Emison v. Whittlesey*, 55 Mo. 258, it was held, that when the vendor of land conveys the title and takes any distinct and independent security, whether by mortgage of other land, or pledge of goods, or personal responsibility of a third person, and also when a security is taken upon the land either for the whole or a part of the unpaid purchase money, the lien will be considered as waived, unless there is an express agreement that the implied lien shall be retained. By taking the bonds of the railroad company as collateral security for the unpaid purchase money, the plaintiff, not having expressly reserved the lien, is to be considered as having waived it. Conceding that the bonds were worthless, because of the insolvency of the company which issued them, does that fact revive the lien, or operate to overcome the legal inference that the lien was waived by acceptance of the bonds? Suppose, instead of these bonds a promissory note of a third party had been assigned as collateral security, would the mere fact that the maker of the note was insolvent when it was assigned, have the effect of overcoming the legal presumption that this lien was waived? Fraudulent representations with respect to the bonds, are charged against the defendant, but they are denied by the answer, and not proven by the testimony.

The evidence of the worthlessness of the bonds is of the flimsiest character, and, if objected to, should have been excluded by the court as hearsay. Plaintiff was permitted to testify, that the cashier of a bank at Clinton, Missouri, told him that these bonds, issued by a railroad company in the state of New York, and made payable in the City of New York, were worthless. Plaintiff has had possession of the bonds since 1877, and from his own testimony, has made no effort to collect any money on them,

or by correspondence, or otherwise to make inquiry, in the City of New York, where they are payable, as to the solvency of the company, or the validity of the bonds.

As, for the foregoing reasons, the judgment will be reversed, it is unnecessary to notice other alleged errors. Reversed and remanded. All concur.

ELY *et al.*, *Appellants*, v. TURPIN.

1. **Mortgagee in Possession**: HIS LIABILITY FOR RENTS, ETC. If a mortgagee enter into possession and then permits the mortgageor to take the profits or to use the mortgage to keep off other creditors, he will be required to account, at the suit of the latter, for the rents and profits for the time he is in possession. In the absence of fraud or neglect of duty he will be required to account for only such as are actually received.
2. **Trustee for Benefit of Creditors**: BOUND TO COLLECT RENTS. If a trustee for the benefit of creditors permits the debtor to take the rents and profits of the trust land, he will be held personally liable for their value, less taxes and the cost of repairs and necessary improvements, but without rests.

Appeal from Carroll Circuit Court.—HON. E. J. BROADDUS, Judge.

REVERSED.

Hale & Eads for appellant.

Jno. L. Mirick for respondent.

NORTON, J.—The petition in this case alleges substantially that plaintiffs, in September, 1863, obtained several judgments against one Z. Moorman, who, a short time before the rendition of said judgments, conveyed all his real and personal property to Turpin and Thompson; that said Turpin and Thompson paid nothing for said property, but that they took the said conveyance to the land and personal

property of Moorman, with the distinct agreement that they were to pay from the proceeds of the property the debts which said Moorman owed, and if anything remained after the payment of said debts, it was to be returned to Moorman; that shortly after said conveyance was made Thompson conveyed his interest in the real estate to Turpin, he having received $390, the amount of his, Thompson's, debt against Moorman; that plaintiffs had executions issued on said judgments, under which the interest of said Moorman in the land conveyed was sold, at which sale they became the purchasers. The petition also charged that said conveyance to Turpin and Thompson was an equitable assignment for the benefit of the creditors of Moorman, and that they held the property in trust for these purposes, and not as purchasers for a valuable consideration; that the legal title was held by Turpin in trust for the creditors of Moorman. The prayer of the petition is, that an account be taken of the money received by said Turpin, and which he ought to have received from the proceeds of the sale or rent of the property conveyed, and of the money paid out by him on account of the debts of said Moorman, and that if more had been paid out than had been received, that plaintiffs be permitted to pay the excess and have the title of said land vested in them. The answer of defendants puts in issue the matters alleged in the petition, and avers that the conveyance of said property was made for a valuable consideration. After hearing the evidence, the court found the issues for plaintiffs, and directed an account to be taken, and for this purpose appointed a referee, who declining to act, the order appointing him was at a subsequent term of the court set aside, and the court proceeded to take an account upon the evidence offered. In taking said account the court refused to charge Turpin with the rents and profits of the land conveyed, and found that Turpin had paid out $5,114.45 more than he had received, and directed that upon the payment of said sums, on or before a day named in the order, that

the title to the real estate conveyed should be vested in plaintiffs. From this judgment plaintiffs appeal, and the sole question presented on the appeal is whether the court, in taking the account, erred in not charging Turpin with the rents and profits of the land.

The court, in finding all the issues for plaintiffs and ordering an account, (which finding we think the evidence warranted,) found that Turpin held the property conveyed simply as a trustee for Moorman's creditors and also for Moorman, said Moorman being entitled to what remained after the payment of his debts. A faithful discharge of this trust required that the trustee should account for all he received and so manage the property as to make it return the largest yield. The evidence shows that Turpin took possession of the farm in 1863, cultivating the same till 1866, when he moved from it; that during the years 1863 and 1864 taxes and repairs equaled the rental value of the land; that said Z. Moorman lived on the land in the same house with Turpin, and he and family were supported out of the proceeds of the farm, and that when Turpin moved off in 1866 said Moorman remained on the place, and that in the spring of that year Wm. Moorman, a son of said Z. Moorman, with the consent of his father and Turpin, took possession of the farm and cultivated it till 1868 or 1869, building a barn on the premises costing about $300; that said Z. Moorman with his family continued to reside on the farm till 1873, when he surrendered eighty acres of the same, and continued to occupy the balance of the farm till his death in 1876; that Turpin was never in possession of said farm except as above stated, or received the rents and profits after he left the same except the eighty acres which were surrendered in the fall of 1873.

If Turpin be regarded simply as a mortgagee, he having entered into possession in 1863 and remained in posses-

1. MORTGAGEE IN POSSESSION: his liability for rents, etc.

sion till 1866, he is liable for the rents and profits for the time he occupied it. If a mortgagee enters upon land and allows the mortgageor to take the profits or permits him to use the mortgage for keeping off other creditors, he will be accountable for the profits. 1 Hilliard on Mortgages, § 41, p. 465. A mortgagee who takes possession of the mortgaged premises is only chargeable with the rents actually received, unless he has been guilty of fraud or neglect of duty. 1 Hilliard on Mortgages, § 2, p. 441.

Viewing the transaction between Moorman and Turpin in the light of the finding of the court and the evidence upon which it was based, the first duty Turpin owed was to the creditors of Moorman, and till that duty was performed by the payment of their demands, Moorman was neither entitled to the possession or profits of the land conveyed; and Turpin having taken upon himself the trust, it was his duty to perform it. The rents and profits of the land belonged to the creditors for whose benefit primarily he held the land, and in allowing Moorman to remain in possession and take the profits he was guilty of neglect of duty, and under the authority herein cited, he was properly chargeable with the rental value of the land, less taxes, expenses incurred for repairs and the cost of necessary improvements, such as the barn which the evidence shows was built on the premises. For the error committed in not charging Turpin in the account taken with the fair rental value of said land, without rests, the judgment will be reversed and cause remanded, with directions for an account to be taken in conformity with this opinion. All concur.

2. TRUSTEE FOR BENEFIT OF CREDITORS: bound to collect rents.

CLARK V. EDWARDS' ADMINISTRATOR, *Appellant.*

1. **The** judgment for the plaintiff is reversed because the evidence fails to sustain the charge of undue influence upon which the action is based.
2. **Married Woman's Deed**: ACKNOWLEDGMENT. The officer's certificate of acknowledgment to a married woman's deed is *prima facie* evidence that it was voluntarily executed.

Appeal from Henry Circuit Court.—HON. F. P. WRIGHT, Judge.

REVERSED.

This was a proceeding by Ann E. Clark and John O. Clark, her husband, to establish a demand against the estate of H. J. Edwards, deceased. Mrs. Clark was the only child of H. J. and Elizabeth Edwards. Early in the year 1858, Mrs. Edwards conveyed a tract of land which she had inherited from her father to one McBride, who shortly thereafter conveyed to Edwards. Mrs. Edwards was ill at the time of executing this conveyance, and soon afterward died. Edwards died in 1876, and in 1877 this proceeding was instituted, the plaintiffs alleging that the conveyance to McBride was obtained through undue influence practiced upon Mrs. Edwards by her husband, and that Edwards ought in law and equity be declared to have taken said property in trust for plaintiff, Ann E. Clark, and to have held the same for her benefit.

Philips & Jackson for appellant.

M. A. Fyke and *F. P. Wright* for respondents.

SHERWOOD, C. J.—On the merits of this cause the complainant has no standing in court. The theory of the prosecution, as shown by the statement filed, is, that H. J. Edwards, the father of Mrs. Clark, compelled her mother to execute a deed, without any consideration therefor, to

McBride, who afterward conveyed the land thus conveyed to him, to H. J. Edwards, who, shortly afterward, sold and conveyed the same, realizing thereby $300. Mrs. Ransdell, in speaking of the mental capacity of her sister, Mrs. Edwards, says, in substance, that she was a woman of more than ordinary intelligence, and of active, sprightly mind. Being asked why her sister executed the deed, she says: "Because her husband would have her to sign it; she did not sign it of her own consent." Yet it is evident Mrs. Ransdell did not regard the conduct of Edwards, the husband, toward her sister, as either unusual or reprehensible, because, when speaking of the clerk's coming out to her house to take her sister's acknowledgment to the deed, she says: "I think he did read something to her, but don't know what it was; never expected any trouble, and paid no attention to it." Another witness says "My sister did not want to make the deed." This is all the evidence bearing on the point of compulsion or undue influence. In what way or manner the sister exhibited dislike to executing the deed, we are not told Nor are we told that the husband exhibited any such disposition toward the wife as could be properly regarded as undue influence or moral coercion; nothing in short, which could bring this case within the principle of the case of *Sharpe v. McPike*, 62 Mo. 300.

If this were a proceeding in equity to set aside the deed, the land still being in first hands, it would be going a great way, much farther than any court has ever gone before, if upon such evidence as this record presents, (if that can be called evidence which seems to be the mere opinion of two witnesses unsupported by a single fact, and uncorroborated by a single circumstance,) we should say such deed should be set aside; and no less evidence is requisite in a proceeding of this nature, than in one of the kind supposed, as in either instance the recovery of judgment or the obtaining a decree, would of necessity involve the production of satisfactory proof of the self-same facts.

Besides, it must be remembered that the acknowledgment of the deed makes out a *prima facie* case that the act of execution was a voluntary act. *Wannell v. Kem*, 57 Mo. 478; *Sharpe v. McPike*, *supra*. For these reasons, then, we hold the allegations of the complaint to be without any substantial basis, and so reverse the judgment. All concur.

HENRY, *Appellant*, v. BASSETT.

1. **Attorneys at Law**: PARTNERSHIP. Attorneys undertaking jointly the defense of a suit at law, become, as to that case, special or limited partners. In the absence of agreement to the contrary, they will be entitled to share equally in the compensation, and it does not matter that one may do more of the work than the other. This will not entitle him to charge as for extra services. Nor will he have any remedy against the other, by dissolution of the partnership or otherwise, for failure to perform his full duty.
2. **Instructions** which wholly ignore an essential issue in the case are properly refused.
3. **Attorneys at Law**: JOINT CONTRACT FOR SERVICES: ABANDONMENT. If attorneys, by joint contract, undertake the defense of a case, mere neglect on the part of one of them to perform services, will not amount to an abandonment of the contract, but refusal might, under proper circumstances.
4. ——: ——: PAROL EVIDENCE. In an action by one attorney against another to recover one-half of the fee received by the latter for both under a written contract to render legal services, one of the defenses relied on was that defendant had employed, and paid a part of the fee to, other attorneys whose assistance he had obtained, with the consent of plaintiff and their client. *Held*, that this did not vary or alter the terms of the principal contract, and parol evidence of it was admissible.
5. ——: ——. In such an action, the fact that the plaintiff is at the same time suing the client for his half of the fee, cannot affect his right of recovery.
6. ——: ——. In such an action, it will be no defense to show that the attorneys could not have compelled payment of the fee if the client had chosen to resist, or that by an arrangement with the

client, the defendant may have to refund it; or that the plaintiff did not render the services he ought to have rendered, or pay his portion of the incidental expenses.

7. **Abandonment of Contract:** A QUESTION OF LAW. What constitutes abandonment of a contract is a matter of law, and the court should instruct the jury as to the effect of the facts they may find, bearing upon the question, and not leave it to them to say, without such instruction, whether a contract has been abandoned or not.

Appeal from Bates Circuit Court.—HON. F. P. WRIGHT, Judge.

REVERSED.

A. Henry pro se.

E. J. Smith and *P. H. Holcomb* for respondent.

HENRY, J.—Plaintiff and defendant were jointly employed as attorneys at law by Mt. Pleasant township, in Bates county, to defend Bates county against certain suits instituted in the circuit court of the United States on bonds issued by said township to the Lexington, Lake & Gulf Railroad Company, and, by the agreement, were to receive as their compensation, $7,000, provided said suit should be successfully defended, and the bonds declared void by the Supreme Court of the United States. In one of the cases, *Harshman v. Bates County*, the said court did so decide, and thereupon Bassett applied to the township board of Mt. Pleasant township, and obtained an order for said $7,000, on executing a bond in the penalty of $14,000, to refund the money he might receive on said order, in the event that other cases, on other of said township bonds should be decided by the Supreme Court of the United States adversely to the township. The case of *Harshman v. Bates County* was subsequently overruled by the Supreme Court of the United States in the case of *Winters et al. v. Bates County*, which was a suit on a portion of said Mt. Pleasant township bonds, which, by this latter decision, were held valid. This suit was instituted by Henry to re-

cover one-half of the amount of the fee received by said Bassett from said township. The answer set up the foregoing facts, and also that Henry had refused and failed to perform any service in said cases, and that Bassett in connection with Glover and Shepley, of St. Louis, whom he employed with the consent of all the parties and paid a fee of $2,000, attended to the cases to their final conclusion, and that Henry gave them no assistance whatever, but wholly failed and refused to do so. The plaintiff's replication denied the statements in the answer. None of the evidence was preserved by the bill of exceptions. All that appears here is, that each party introduced evidence tending to prove the issues on his part. After the evidence was closed, the court refused certain instructions, asked by plaintiff, and gave the jury instructions for defendant, and thereupon plaintiff took a non-suit with leave to move to set it aside, and a motion to that effect having been by the court overruled, plaintiff has appealed to this court.

Plaintiff and defendant were special or limited partners. Story on Part., § 75. In the absence of an agreement to the contrary, they were to share equally in the compensation. Story on Part., § 24. Neither, without an agreement to that effect, could charge the other for extra services. *Bennett's Adm'r v. Russell's Adm'r*, 34 Mo. 524; *Cramer v. Brachman*, 68 Mo. 310; Story on Part., § 182. In the transaction of the business they had engaged to attend to for Mt. Pleasant township, neither could do more than their joint agreement required. Nothing that either might do necessary to the defense of those suits, could be regarded as extra service. One might do less, but the other could not do more than his duty, and one partner has no remedy against one who does less than his duty, in transacting the business of the firm, but in a proceeding to dissolve the connection. In a partnership, however, limited to one transaction, in which the partners have become bound to a third party, to perform certain services, we know of no way for one of the partners to

1. ATTORNEYS AT LAW: partnership.

extricate himself. Neither of the partners can release the other from his obligation to such third party, nor is it competent for any court to relieve either of his liability to such third person, against his consent.

2. INSTRUCTIONS.

The first of plaintiff's refused instructions asked the court to instruct the jury, that if plaintiff and defendant contracted with said township to defend certain suits against Bates county, and the township agreed to pay them $7,000 when any case should be decided by a court of last resort, holding that said bonds were void, and that plaintiff and defendant executed to said township their joint bond for $14,000, to secure their compliance with their contract, and that in *Harshman v. Bates County* there was a decision rendered by the court of last resort, that said bonds were void, and that afterward defendant received said stipulated fee, the jury should deduct from said sum the money necessarily expended by defendant in attending and defending said suit, including fees paid other attorneys employed, etc., and find for plaintiff one-half of the balance. The second declared, that if plaintiff and defendant jointly contracted with said township, and gave their joint bond for $14,000 to perform their joint obligation, they should find that plaintiff and defendant were equally entitled to the net profits obtained on said contract. These instructions were properly refused. They wholly ignore the issue made by the pleadings in the allegation of the answer, denied by the replication, that plaintiff had refused to perform any service under the contract, and as the evidence on that issue is not preserved by the bill of exceptions, we are not prepared to say that error was or was not committed in refusing the instruction.

3. ATTORNEYS AT LAW: joint contract for services: abandonment.

The simple neglect of one of the parties to perform service under the contract, would not amount to an abandonment of the contract by him. A refusal to perform service is of more significance. It might, under certain circumstances, amount to a dissolution of the partnership, as between the parties.

The refusal of one partner to do his duty in a general partnership, would not dissolve the partnership, but in a partnership like this, limited to one transaction, we are not prepared to say that a refusal under no circumstances would have that effect. Here there is no evidence preserved, and we are left to grope in the dark on the subject, and cannot say that the court erred in refusing the instructions.

The plaintiff's fourth was to the effect, that plaintiff should not be charged with any fees, or costs incurred, in defending any other suit than those mentioned in the contract with Mt. Pleasant township. So far as appears in this record, the court properly refused the instruction. The contract with the township is not fully stated in the plaintiff's petition, nor does it appear in the bill of exceptions, and how is this court to determine, whether plaintiff is liable or not for his proportion of fees and costs incurred in other cases than those specifically mentioned in that contract?

The sixth instruction presents a question which, for the same reason, we cannot determine. There is nothing to show that parol evidence was admitted to alter or vary the terms of the contract between the township and these parties. In the answer, Bassett alleges that with the consent of all the parties, he employed Messrs. Glover & Shepley to assist in the defense of the suits. If there was evidence on that point, and it is that of which plaintiff complains, his complaint is without foundation. The contract with Glover & Shepley did not vary or alter the terms of the other contract. It was a separate and independent contract between the parties to this suit and Glover & Shepley.

4. ——: ——: parol evidence.

The fifth asked by plaintiff was in substance, that the pendency of a suit by this plaintiff against Mt. Pleasant township for his half of the fee, was not a bar to this suit. The court refused it in that form, but gave it with this qualification: "But may be considered in determining whether plaintiff has a right to recover in

5. ——: ——.

this action against defendant.' Why this was added, and what it means, we do not understand. How could the fact of the pendency of that suit, if not a bar to this, aid the jury in determining plaintiff's right to recover in this?

The first instruction for defendant given by the court, declares that plaintiff cannot recover unless the plaintiff 6. ——: ——. and defendant could have maintained an action for the $7,000 against the township of Mt. Pleasant on their contract. What Bassett received from the township he received for both himself and Henry, if he and Henry were partners in the defense of the suits against Bates county. He received it under a contract which recognized Henry's right to half of the money, and whether the township could have successfully defended a suit instituted by Henry and Bassett on that contract, is wholly immaterial. The township has paid it, and paid it to one of two parties, who, by the terms of the agreement, were equally entitled to it.

The second for defendant declares, that if the warrant was delivered to Bassett on the condition that he was to return the money if either of the suits should be decided adversely to Bates county, and he executed a bond to secure his compliance with such condition, and other suits were yet undetermined, plaintiff could not recover. What was said of defendant's first instruction is equally applicable to this. Bassett received the money from the township, under the contract, for himself and Henry, and cannot set up a possible or probable right of the township to recover it back.

The defendant's third instruction told the jury, that before they could find for plaintiff, they must find that he entered upon the defense of said suits and performed the labor and services the contract required, and that if he failed, neglected or refused to do so, and defendant performed the services, plaintiff could not recover, unless the township assented to such failure, and defendant agreed to perform such services, if plaintiff would pay half of the

expenses, and that defendant did perform such services. The defendant here attempts to avail himself of a defense against plaintiff which the township might have urged in a suit by these parties on the contract. This he cannot do. The township could no more relieve Henry of his duty to the defendant, than Henry or Bassett could relieve each the other of his obligation to the township. If the township saw proper to pay the fee of $7,000, notwithstanding Henry had not discharged his duty under that contract, it does not matter, so far as the relations between Henry and Bassett are concerned, whether the township could have avoided paying it or not.

The fourth declares, that Henry could not recover, if he performed no services under the contract with the township, or failed or neglected, or refused to pay his portion of the expenses of the litigation. For reasons already given, this instruction was improper.

The fifth declares that if after the contract was concluded, the plaintiff abandoned it, and did not perform any services under it, and defendant did, and procured to be done, all the services under said contract, which have been done, then plaintiff cannot recover. If the evidence in relation to the abandonment of the contract by Henry, had been preserved, we would have some light upon this instruction, which might enable us to pass upon it. What the facts relied upon to constitute an abandonment are, we are not informed. They should have been given, and the court declared their effect. It was improper to submit it to a jury to say whether the contract was abandoned or not.

7. ABANDONMENT OF CONTRACT: a question of law.

The next instruction, number six, declares, that either a refusal, or a failure, on the part of Henry, to render services, under the contract, amounted to an abandonment of the contract on his part. His mere failure to render service, we have seen, would not amount to an abandonment. A refusal to do so might. It would depend, as we have seen, upon all the circumstances under which it was made. This

instruction, we think, clearly erroneous, in declaring that a mere failure to perform service under the contract was an abandonment.

We do not think that the plaintiff "needlessly took his non-suit." The instructions given absolutely precluded his recovery, if the jury followed them, and there was any evidence to support them, and that there was we may assume from the fact that the court gave them.

The bill of exceptions not containing the evidence, we have been no little perplexed in determining the questions involved in many of the instructions. While, ordinarily, it is unnecessary to set out all the evidence, yet in this case it is impossible, satisfactorily to determine the questions involved in the absence of the testimony. The judgment is reversed and the cause remanded.

STIX *et al.*, *Plaintiffs in Error*, v. MATTHEWS.

1. **Promissory Notes**: NEGOTIABILITY: LAW OF SISTER STATE. By the law of Indiana, such notes only are negotiable as are made payable at a bank in that state; and the name of the bank must be correctly stated in the note. This rule will be enforced in an action brought in this State upon a note executed in Indiana. Where, therefore, in an action brought upon such a note to charge the assignor as indorser, it appeared that there was no such bank as that named in the note; *Held*, that the action could not be maintained.
2. ——: PROTEST. A notary's certificate of protest of a note payable at a bank is defective if it fails to show presentment to some officer or person at the bank and demand of payment made of him.
3. **Pleading**: PRACTICE. The plaintiff will not be allowed to recover upon a theory of the case directly adverse to that upon which the petition plainly proceeds and the case has been tried; and this although there is a fact alleged in the petition and proven by the evidence which, under other circumstances, might authorize recovery on the adverse theory.
4. **Promissory Notes**: PROTEST: EVIDENCE. Where in an action brought upon several promissory notes to charge the defendant as

indorser, the evidence as to one of the notes failed to show that payment was ever demanded of the maker, and as to the rest showed that they were non-negotiable. *Held*, that proof of waiver of notice of protest was irrelevant, and it was no error to exclude it.

Error to Jackson Special Law and Equity Court.—Hon. R. E. Cowan, Judge.

Affirmed.

Frank Titus for plaintiff in error.

Even if the first four notes were non-negotiable under the laws of Indiana, the petition alleged and the evidence is that the makers were non-residents of this State, and the defendants as assignees thereof, were liable. R. S. 1879, § 665.

Lathrop & Smith for defendant in error

Norton, J.—This is a suit instituted by plaintiffs against defendants as indorsers on five notes as negotiable paper. There are five counts in the petition. In the first count the note declared upon was payable at the "Bank of Bedford, Lawrence county, Indiana;" in the second at the "Bedford Bank, Lawrence county, Indiana;" in the third at the "Bank in Bedford, Lawrence county, Indiana;" in the fourth at the "Bank in Bedford, Lawrence county, Indiana;" in the fifth the note was payable at the "Bank of Wheeling, West Virginia."

This cause has heretofore been before this court, and is reported in 63 Mo. 371, when the judgment of the circuit court was reversed and cause remanded because of the refusal of the court to instruct the jury that there was no evidence that defendants had proper notice of the dishonor of the notes sued upon, and for that reason plaintiff could not recover. It was then held that, as to notes executed in and made payable in Indiana, the question of their negotiability was to be determined by the laws of In-

diana. It was also held that the allegation in the petition "that payment of the notes was refused by the cashier of the branch, at Bedford, of the Bank of the State of Indiana, said bank being the place where said notes were payable" not having been denied by answer, that both the notes and certificates of protest were receivable in evidence, but that notice of protest not having been brought home or given to defendants, the court erred in refusing the instruction asked. It was also held that, the notes showing upon their face that they were to be paid in a bank in Indiana, and nothing else appearing, under section 6, article 2 of the statutes of that state, they were negotiable.

The record now before us presents a different state of case from that presented in the record when the case was here before. After the cause was remanded defendants were permitted to file an amended answer, in which, after denying every allegation of the petition, they aver that at the time of the execution of four of said notes, there were not, and had not been since, any such banks as those named in the said notes. The cause was re-tried on said answer, and after plaintiff had closed his case the court sustained a demurrer to the evidence and rendered judgment for defendants, and it is this action of the court of which plaintiffs chiefly complain, they having prosecuted their writ of error from said judgment.

1. PROMISSORY NOTES: negotiability: law of sister state.

The 6th section, article 2 of the statutes of Indiana, provides that "notes payable to order or bearer in a bank in this state shall be negotiable as inland bills of exchange, and the payees and indorsees may recover as in case of such bills." Under this section the supreme court of Indiana has held that a note, to be negotiable, must be made payable at a bank in Indiana; that the name of the bank must be correctly stated in the note; that a party to a note claimed to be negotiable is not estopped from denying that there was any such bank as that named in the note, or from proving that fact when averred in his answer. *Porter v. Holloway*,

43 Ind. 35; *Parkinson v. Finch*, 45 Ind. 123; *First National Bank of Kansas City v. Grindstaff*, 45 Ind. 158. In the case last cited, the action was founded on two promissory notes executed by the defendants to Matthews & Bro., and indorsed by them to plaintiff. The notes on their face were "payable and negotiable at the Bedford Bank, Lawrence county, Indiana." The defendants in their answer, among other things, averred that there never was any such bank as that named in the note, and it was expressly ruled that the defendants were not estopped from setting up the non-existence of such a bank as was named in the notes as against an innocent holder, and such fact when established rendered said notes non-negotiable. Plaintiff's evidence established beyond controversy that there were no such banks as were named in the four notes payable in Indiana, and under the authority of the above cited cases the court ruled properly in sustaining defendant's demurrer to the evidence as to said notes.

The demurrer to the evidence as to the note in the fifth count of the petition payable at the "Bank in Wheel-
2. ——; PROTEST. ing, West Virginia," was also properly sustained. Aside from the fact that the notary's certificate of protest showed that the note was presented at the "Bank of Wheeling, West Virginia," for payment, and the fact that there was no proof that the "Bank in Wheeling," where the note was made payable, and the "Bank of Wheeling," were the same, the certificate is defective in not showing that the presentment was made to some officer or person at the bank, and demand of payment made of such officer or person.

It is also insisted that notwithstanding the fact that plaintiffs were not entitled to a recovery against defend-
3. PLEADING: practice. ants as indorsers of negotiable paper, they were entitled to a recovery against them as the assignors of non-negotiable paper, as the petition contained an averment that the makers were non-residents of this State. The answer to this is, that defendants were

not sued as assignors, but as indorsers of negotiable notes. The case has twice been tried upon issues framed upon that theory, and under the authority of the case of *Clements v. Yeates*, 69 Mo. 625, plaintiffs failing to make out the cause of action set forth and relied upon in the petition, cannot recover upon another cause.

It is also insisted that the court erred in refusing to allow plaintiffs to offer in evidence the pleadings in the cause as they stood before the amended answer was filed. This evidence was offered for the purpose of showing a waiver by defendants of notice of protest. Conceding that it might properly have been received for that purpose (without determining whether it was or not receivable), still the error was an immaterial one, and the evidence if received could not have affected the result, as the demurrer to the evidence as to four of the notes was sustained on the ground that it established the fact that they were non-negotiable, and as to the note payable in Wheeling on the ground that the certificate of protest was insufficient to show that the note was, in fact, protested. Judgment affirmed, in which all concur.

4. PROMISSORY NOTE: protest: evidence.

ATLEE *et al.*, *Appellants*, v. FINK.

1. **Principal and Agent**: IMPLIED POWER OF AGENT. An agent to sell has no implied power to bind his principal by an agreement to pay another commissions for making sales.

2. ——: SECRET CONTRACT OF AGENT WITH ADVERSE PARTY. A dealer in lumber agreed to pay to a builder, who was employed to superintend the erection of buildings for others, and whose duty it was to pass upon accounts presented for materials furnished, but not to make purchases, a commission on all sales of lumber made to the builder's employers through his influence. This agreement was not made known to the employers. *Held*, that it was against public policy and void.

Appeal from Jackson Circuit Court.—Hon. S. H. Woodson, Judge.

Reversed.

Tomlinson & Ross for appellants.

O'Sullivan had no power to appoint a sub-agent at the expense of the plaintiffs. Story on Agency, (6 Ed.) § 387, and note; Ib., §§ 13, 14, 15; 2 Kent Com., (12 Ed.) side p. 633, sub-div. 9, and note; *Paddock v. Colby*, 18 Vt. 485; *Solly v. Rathbone*, 2 Maule & Selw. 299, *et seq; Warner v. Martin*, 11 How. 209; *Cronkite v. Wells*, 32 N. Y. 247. The policy of the law forbids that O'Sullivan, acting as the servant and confidential adviser of the purchasers, should, at the same time, be secretly receiving a compensation from the seller for effecting the sales, and a contract for such compensation is void even if no actual fraud is perpetrated on the purchaser. *Bollman v. Loomis*, 41 Conn. 581; *s. c.*, 15 Am. L. Reg. 75; *Spinks v. Davis*, 32 Miss. 152; *Fuller v. Dame*, 18 Pick. 472; *Wyburd v. Stanton*, 4 Esp. 179; *Jacques v. Edgell*, 40 Mo. 76; *Kanada v. North*, 14 Mo. 615; *Lingle v. Ins. Co.*, 45 Mo. 109; *Tool Co. v. Norris*, 2 Wall. 45; *Fireman's Char. Ass'n v. Berghaus*, 13 La. Ann. 209; Story on Agency, §§ 31, 210, 212, 214, 330, 344; Wharton on Agency, §§ 244, 573, 715, 716; *Oscanyan v. Winchester Arms Co.*, 17 Am. L. Reg. 626; *Harrington v. Victoria Dock Co.*, 7 Reporter 32; *Morison v. Thompson*, L. R., 9 Q. B. 480; *Bartle v. Nut*, 4 Pet. 184; *Reynolds v. Nichols*, 12 Iowa 398; *Walker v. Osgood*, 98 Mass. 348; *Roby v. West*, 4 N. H. 285; 3 Cent. L. J. 263; 3 Wait's Actions & Def., (Ed. 1878) 586, 587, 589; *Childress v. Cutter*, 16 Mo. 24; *Dunlop v. Richards*, 2 E. D. Smith 181; *Farnsworth v. Hemmer*, 1 Allen 494; *Pugsley v. Murray*, 4 E. D. Smith 245.

J. D. S. Cook for respondent.

The contract was not inconsistent with Fink's duties

as superintendent of the buildings upon which he was employed. If he had been employed to buy lumber, he would have no right to a commission from the seller, even if he got it at the lowest market price. But he was not so employed. His only duty was to certify the bills. His employers bought the lumber, fixing both the quality and price, and his certificate simply showed that the quantities called for by the bills had been delivered.

HENRY, J.—Plaintiffs sued defendant for balance on account for lumber sold, $497.68. In his answer, defendant admits the purchase, but his defense is, that there is in the account an overcharge of $35, that he is entitled to a credit of $184.36, paid on the account, and that plaintiffs owe him $261, as commission on lumber sold by plaintiffs to defendant's employers, on defendant's recommendation, for which he alleges plaintiffs agreed to pay him a commission of two and one-half per cent. All of these allegations were denied by plaintiffs' replication. The defendant obtained a judgment for $38.73, from which plaintiffs appeal.

The evidence shows that plaintiffs resided at Fort Madison, Iowa, and were engaged in manufacturing and selling lumber; that they established a branch of their business at Kansas City, Missouri, and placed J. O'Sullivan in charge of it, to sell lumber. O'Sullivan testifies that he was employed by plaintiffs to sell their lumber. Samuel Atlee, one of plaintiffs, testifies that O'Sullivan was not authorized to make any agreement to pay commissions to other persons for selling their lumber. The firm paid O'Sullivan a salary of $1,800 per annum. The defendant, Fink, testifies that he, O'Sullivan and W. H. Atlee, (who was not a member of the firm of plaintiffs,) were together when O'Sullivan and defendant made the agreement by which the latter was to receive the commission on sales O'Sullivan might make to defendant's employers through defendant's influence with them; that his employers paid

him for superintending the erection of the various buildings erected by them, and it was his duty to keep the laborers at work, and see about materials and all details; that his employers would pay no bills for labor or lumber until certified by defendant to be correct; that he never informed them, or any of them, that he was to get a commission on the lumber purchased by them of plaintiffs. This is the substance of the testimony on the only branch of the case which we deem it necessary to consider.

O'Sullivan was not expressly, or by the nature of his employment, authorized to make the contract in question. He was, as he testified, but an agent to sell, and could not delegate that authority to an other. Especially was he not authorized to promise a compensation for sales made for the firm by others, which would bind the firm. Story on Agency, (6 Ed.) § 387; *Warner v. Martin*, 11 How. 209.

1. PRINCIPAL AND AGENT: implied powers of agent.

But it is unnecessary to extend our remarks on that proposition, because, if O'Sullivan had had ample authority to make such a contract, it is contrary to public policy to allow the plaintiffs to recover on it. He was employed by others to transact business for them, and they paid no bills for lumber not certified by him to be correct, and for two and one-half per cent commission on sales to his employers, he sold his influence with them to the plaintiffs. He kept them in ignorance of the agreement he had made with O'Sullivan. That agreement was a temptation to him to certify as correct, bills for lumber which might be incorrect, both as to the amount of lumber and prices charged. His compensation could be increased by such conduct, and it is no answer, that nothing of the kind occurred. In *Fuller v. Dame*, 18 Pick. 472, the court said: "The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the right and interest of third persons." In *Spinks v. Davis*, 32 Miss. 152, the

2. ——: secret contract of agent with adverse party.

court said: "It is a sufficient objection to a contract on the ground of public policy, that it has a direct tendency to induce fraud and malpractice upon the rights of others, or the violation or neglect of high public duties." One employed by another to transact business for him, has no right to enter into a contract with a third person, which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith toward his employer. The interests of the defendant's employers, and those of plaintiffs, as buyers and sellers, were antagonistic, and defendant could not serve two masters in a matter in which there was such a conflict in their interests. It makes no difference that defendant was not employed to purchase the lumber for his employers. It is enough that it was his duty, under his employment, to examine and certify to the correctness of the lumber bills.

Under this view, it is wholly immaterial whether the agreement made by O'Sullivan with the defendant was ratified or not by the plaintiffs. The ratification of the contract would not have eliminated the element which rendered it invalid. The trial court entertained a different view of the subject, and embodied, in instructions given, that erroneous view, and refused instructions asked by plaintiffs which declared the law as herein announced, and its judgment is, therefore, reversed and the cause remanded. All concur.

CARTER v. REEVES, *Appellant.*

Sheriff's Deed: RECITALS. A sheriff's deed executed in pursuance of a power conferred by a mortgage to the county, will be void if it fails to recite that a certified copy of the order of the county court requiring the sheriff to foreclose was delivered to him and that the

sale was made in pursuance of the order; but if these are facts, the purchaser may obtain a new deed properly reciting them.

Appeal from Howell Circuit Court.—Hon. J. R. Woodside, Judge.

Reversed.

A. H. Livingston for appellant.

Hynes & Olden for respondents.

Hough, J.—This is an action of ejectment. On February 16th, 1872, the defendant sold and conveyed the land sued for to one Durham. On the 23rd day of April, 1872, Durham executed to the defendant a mortgage to secure the payment of the unpaid purchase money, which became due and payable on the 25th day of December, 1872. On the 28th day of February, 1873, the purchase money being then due and unpaid, Durham borrowed $400 from the county of Howell, and to secure the payment thereof, executed to said county a mortgage on the land sued for. On the 12th day of March, 1873, the defendant being then in the possession of the land under his mortgage from Durham, with knowledge of the fact, as he himself testifies, that Durham had mortgaged the land to Howell county, accepted a conveyance of said land from Durham, in consideration of the sum of $1,200, which sum included the $400 due by Durham to Howell county, and on the same day entered satisfaction of his mortgage from Durham. The plaintiffs claim title through a deed to them from the sheriff of Howell county, dated the 7th day of May, 1877, purporting to be made by said sheriff in execution of a power to sell and convey, conferred upon him by the mortgage to Howell county, in case of default in the payment of the money secured thereby. An order of the county court, to the sheriff, to foreclose said mortgage, appears in the record, but the date on which it was made does not appear. The deed of the sheriff fails to recite that a cer-

tified copy of said order was ever delivered to him as required by law, nor is it recited in said deed that the sale by the sheriff was made in pursuance of such order. The deed from the sheriff is, therefore, insufficient to pass title to the plaintiffs, and should not have been admitted in evidence against the objections of the defendant. *Wilhite v. Wilhite*, 53 Mo. 71; *Warner v. Sharp*, 53 Mo. 598. If the sale by the sheriff was in fact duly made in pursuance of an order of the county court, the plaintiffs may yet obtain a deed from the sheriff executed in proper form and containing the necessary recitals. If the sale was made without proper authority, the defendant may, of course, discharge the mortgage to the county, by the payment of the debt and interest secured thereby, for which, on the facts disclosed in this record, he is unquestionably bound. The judgment will be reversed and the cause remanded. The other judges concur.

HIGGS v. HUNT, *Appellant.*

Practice: REMITTITUR: COSTS. A judgment for an amount greater than that claimed in the petition, is bad: but the error may be cured by remittitur in this court. This, however, will throw the costs of the appeal upon the respondent.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON, Judge.

AFFIRMED.

Wm. E. Sheffield for appellant.

Lathrop & Smith for respondent.

NORTON, J.—This cause is here on the appeal of defendants from a judgment of the Jackson county circuit

court rendered in a suit instituted therein on the following obligation, viz:

"We, the undersigned, do hereby agree to save R. E. Higgs harmless in the sum of $180 as bondsman in the case of G. P. Schmidt against The Kansas Midland Railroad, the above being the amount of judgment and costs."

R. H. HUNT.
L. K. THATCHER.

Various errors are assigned, but the only one which counsel for defendants have deemed of sufficient importance to call our attention to in his brief, is as to the action of the court in refusing to sustain their motion for a new trial on the ground that the judgment was in excess of the amount claimed in the petition, the amount claimed being $180, and the judgment being for $187.80.

Under the authority of the case of *Beckwith v. Boyce*, 12 Mo. 440, error was committed in overruling the motion for new trial. As plaintiff, however, enters a remittitur for $7.80, the excess in the judgment, the error is cured and obviates the necessity which would otherwise exist for reversing the judgment, which is in all respects affirmed except as to said sum of $7.80.

Inasmuch as defendants have been compelled to come to this court for the correction of this error, the plaintiff will be required to pay the costs of this appeal, which are hereby adjudged against him. *Miller v. Hardin*, 64 Mo. 545. All concur.

THE STATE v. WAGSTER, *Appellant*.

Horse-racing in Public Road: INDICTMENT: EVIDENCE. An indictment for running a horse-race in a public road, will be supported by proof that defendant procured another to ride his horse in the race. R. S. 1879, § 1531.

Appeal from Dunklin Circuit Court. — Hon. R. P. Owen, Judge.

AFFIRMED.

Houck & Fisher for appellant.

D. H. McIntyre, Attorney General, for the State, cited 1 Bishop Crim. Law, (6 Ed.) § 685; *Stratton v. State*, 45 Ind. 468; *U. S. v. Mills*, 7 Pet. 138; *Sanders v. State*, 18 Ark. 198; 54 Barb. 299; 12 Sm. & M. 58.

Henry, J.—The appellant and one Crockett were jointly indicted for running a horse-race in a public road, in the county of Dunklin, and on a trial, appellant was convicted and fined $10, and has appealed from the judgment. The evidence proved that the parties indicted made the race, and that Crockett rode his own horse, but that appellant's horse was ridden by one Jones, whom appellant employed to ride for him. There is nothing in the point that this evidence did not support the charge in the indictment, "that Wagster and Crockett made and ran the race." It would be an easy matter to evade the statute if such a subterfuge was countenanced. Wagster made and ran the race, although Jones rode his horse. He was just as guilty as if he, instead of Jones, had ridden his horse. Horses might be trained to run races without riders, and, if turned loose on a public road, to run a race, the parties who made them would be as guilty as if the horses were ridden in the race. It is not necessary to cite the numerous authorities to the effect, that, in misdemeanors, all who procure or participate in their commission are principals. A few will suffice. *Lowenstein v. People*, 54 Barb. 299; *Williams v. State*, 12 Sm. & M. 58. The judgment is affirmed. All concur.

GRANT v. HOLMES, *Appellant.*

1 **Partnership**: RELEASE OF CO-DEBTOR. A creditor of a firm may release one member of the firm without discharging the others.

2. **Temporary Judge.** When a temporary judge, selected by the parties, by their consent has tried a cause without being sworn, neither of them will afterward be heard to urge this as an objection to the validity of the judgment.

Appeal from Carroll Circuit Court.—The case was tried before I. H. KINLEY, ESQ., sitting as Temporary Judge.

AFFIRMED.

Hale & Eads for appellant.

Shewalter & Sebree and *J. L. Mirick* for respondent.

HOUGH, J.—This is a suit against the defendant as a member of the firm of Holmes & Co., which, it is alleged in the petition, is composed of the defendant and one George Magee. The petition sets forth certain transactions had by plaintiff with said Magee, for and on behalf of the firm of Holmes & Co., and avers that on a final settlement thereof there was found to be due to plaintiff the sum of $402.45, one-half of which sum was paid to plaintiff by said Magee, who was thereupon released and discharged by plaintiff from all further liability as a member of said firm, on account of said transactions, and prays judgment against the defendant for the balance due on said account, to-wit: The sum of $201.22. The testimony offered by plaintiff tended to sustain the allegations of his petition, and that offered by the defendant was in contradiction thereof.

The plaintiff asked no instructions. At the instance of the defendant, the court gave the following: 1. "In order to recover in this action, the plaintiff must show by a preponderance of evidence that at the time of the alleged transactions between plaintiff and Magee, defendant was

a partner with Magee in the purchase and sale of said corn, and that the balance claimed is actually due from said alleged firm."

4. "If the defendant was only interested in the shelling of the corn by contract between him and Magee, and was not interested in the purchase and sale of the corn, then the verdict should be for the defendant."

The court, of its own motion, gave the following: "If plaintiff's transactions were with Magee alone, and not with the alleged firm, and he has voluntarily released Magee from the alleged balance, then plaintiff cannot recover in this action."

The following instructions, asked by the defendant, were refused: 2. "If the plaintiff's accounts and transactions were all with and in the name of Magee, and he had no transactions with defendant by name, or in the name of the alleged firm, he cannot recover against defendant without showing that he was a dormant partner and that Magee is insolvent."

3. "If plaintiff's transactions were with Magee by name alone, and not with the alleged firm, and he has voluntarily released Magee from the alleged balance, then he cannot recover in this action."

5. "On all the testimony in the case, the verdict should be for defendant." The plaintiff recovered judgment and the defendant has appealed.

The defendant contends that although he may have been a partner of Magee, the plaintiff by releasing Magee has discharged him also, and the petition, therefore, fails to state a cause of action against him. Section 666 of the Revised Statutes, is as follows: "It shall be lawful for every creditor of two or more debtors, joint or several, to compound with any and every one or more of his debtors, for such sum as he may see fit, and to release him or them from all further liability to him for such indebtedness, without impairing his right to demand and collect the balance of such indebtedness from the other debtor or debtors thereof,

and not so released; provided that no such release shall impair the right of any debtor of such indebtedness not so released to have contribution from his co-debtors as is by law now secured to him." The defendant contends that this section does not apply to a debt due by a co-partnership. We are of a different opinion.

The instructions given by the court fairly submitted to the jury the question of the liability of the defendant as a partner. Without discussing the legal proposition therein contained, it is sufficient to say that the testimony for the plaintiff tended to show not only that the transactions of plaintiff were with Magee, and in his name, but that they were had with him for and on behalf of the firm of Holmes & Co.

This cause was tried in the court below by I. H. Kinley, Esq., and the following entry in regard to his selection appears of record: "Now come the parties by their attorneys, and it appearing that the judge presiding is of kin to the party plaintiff herein, and cannot sit in this cause, it is, therefore, agreed by the parties to this suit, that I. H. Kinley, Esq., shall hear and determine the same without being sworn." It is now contended on behalf of the defendant, that as the person so selected was not sworn, he had no authority to try said cause, and the judgment is void.

The act of May 19th, 1877, which was in force when this cause was tried, (Sess. Acts 1877, p. 218,) provides that when from any cause the judge cannot preside, and the parties fail to agree upon some one to preside at the trial, a temporary judge, having the qualifications of circuit judge, shall be elected from the attorneys present. Section 5 of said act provides that "the person thus elected, shall, during the period he shall act, have all the powers and be liable to all the responsibilities of the circuit judge. Section 6 is as follows: "The parties to an action may agree upon one of the attorneys of the court to preside and to hold the court for the trial of such action, who shall pos-

sess the qualifications of a circuit judge, and while so presiding shall have all the powers and be liable to all the responsibilities of the circuit judge." Section 7 is as follows: "Every temporary judge thus elected, shall, before he enters upon the discharge of his duties, take and subscribe to the same oath required to be taken by a circuit judge, which shall be filed with the clerk."

It is a matter of some doubt whether the word "elected," as employed in section 7, was intended to have a signification different from that which it was intended it should bear in section 5, and it is clear that in the last named section it was not employed in the broad and general sense of "selected" or "chosen," and this doubt is increased by the provisions of section 8, which requires, "in case of a temporary judge being elected," that an entry of record shall be made showing that the requisite oath has been taken and filed. It may be that where the parties agreed upon an attorney, the oath was to be dispensed with.

However this may be, we do not think that after a trial has been had by a person selected by the parties and who it was agreed by the parties should not be sworn, either party should be heard to object that such person was not sworn. Section 329 in chapter 4 of the Revised Statutes, provides that arbitrators appointed under that chapter shall be sworn before proceeding to hear and determine the matters submitted to them. In *Walt v. Huse*, 38 Mo. 210, it was decided that arbitrators appointed under the statute, act in a judicial capacity, and that they must be sworn or their award will be invalid. But in the case of *Tucker v. Allen*, 47 Mo. 488, it was expressly decided that where the parties agree that the arbitrators may act without being sworn, their award will be valid and binding. We are of opinion that the judgment of the circuit court should be affirmed. The other judges concur.

FORNEY v. GELDMACHER, *Appellant.*

Tort: WILLFULLY CAUSING HORSES TO BREAK AWAY: DAMAGE BY COLLISION. Defendant finding a team of horses hitched to a post in the street in front of his premises, willfully and intentionally threw a stream of water from a hose upon them, whereby they were frightened and breaking away ran down the street and collided with plaintiff's team. *Held*, that plaintiff was entitled to recover of defendant the damage caused by the collision.

Appeal from Jasper Circuit Court.—HON. JOSEPH CRAVENS, Judge.

AFFIRMED.

Galen Spencer for appellant.

Clark Craycroft for respondent.

HENRY, J.—In plaintiff's petition, it is alleged, that there was a span of horses, attached to a wagon, hitched to a post in front of defendant's business house in the city of Joplin, and that defendant, by means of a hose, while sprinkling water on his pavement, "willfully, maliciously, negligently and without reasonable cause, intending to injure plaintiff and others," turned the hose and threw a stream of water upon said horses, by which they were frightened and broke loose, and, running down a street of said city, collided with plaintiff's horse and wagon, then being driven by plaintiff's servant, whereby the injury complained of was occasioned. The evidence is not preserved by the bill of exceptions, but it stated that, on the part of plaintiff, it tended to sustain the issues on his part. The court refused to instruct the jury, at the close of plaintiff's evidence, that, on the pleadings and evidence, he could not recover, but for plaintiff, instructed the jury, that if defendant willfully and intentionally threw the water upon or under the horses, which frightened and caused them to break loose and run through the street, and they

ran against plaintiff's wagon, they should find for plaintiff; but that he could not recover unless the defendant willfully and intentionally threw the water on the team. The plaintiff had a judgment, from which defendant has appealed.

The horses which ran against plaintiff's horse and wagon, were not the property of defendant, but of another. This, however, is wholly immaterial in the consideration of the question involved. The defendant, as the jury found, willfully turned the hose upon the horses, which were hitched to the post, and the injury to plaintiff's property was a direct result of his act. While one is not presumed to know the disposition or habits peculiar to particular animals, but only the disposition and habits which are common to that species of animal, every one is chargeable with notice of the generic disposition of any kind of animal, wild or tame, to stray, and of its liability to take fright. This is substantially the doctrine stated by Shearman & Redfield in their work on Negligence, section 188, cited by appellant's counsel. In the celebrated case of *Scott v. Shepherd*, 3 Wilson 403, Naves, Justice, in passing upon the question whether an action of trespass *vi et armis* would lie against defendant who threw the lighted squib, observed: "The nature of the act, the time and place when and where it was done, make it highly probable that some personal damage would immediately happen thereby, to somebody then present in a crowded market house on the fair day." This observation of the learned justice is pertinent to the case at bar. The horses and wagon were in a street of the city of Joplin, and defendant knew that the probable consequence of throwing a stream of water upon the horses, would be, to make them break their fastening, and run, to the great danger of any one driving a team through the street. The owner of the horses was not liable, because he had hitched them to the post, and the defendant is as culpable in law and morals, as if he had untied their fastening, and started the horses on a run through

the street, for he must have known that the result of his conduct would be the same.

The case bears but little resemblance to that of *Illidge v. Goodwin*, 5 Carr. & P. 190, cited by appellant's counsel. There the owner of a horse, drawing a cart, left the horse standing loose in the street; but the defendant offered to prove that the horse was of a gentle, quiet nature, and would have stood where he was left, but that a mischievous person struck him and he backed against plaintiff's window and broke his china-ware. Tindal, J., said this did not amount to a defense. "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done." It was not determined—it was not a question in the case—whether the person who struck the horse would also have been liable to plaintiff. We have no doubt he would. In the case at bar, Turk, who owned the horses, was not liable. He had hitched his horses to the post, and, but for the willful act of defendant, they would probably have stood there until removed by their owner; and if the law would afford no redress to the plaintiff, in such a case, it would be lamentably defective. The judgment is affirmed, all concurring.

McGINDLEY, *Appellant*, v. NEWTON.

A suit will not lie to set aside or correct errors in a judgment obtained without fraud, or to procure a re-taxation of costs.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

A. N. McGindley and *James Carr* for appellant.

Eli J. Newton pro se.

HENRY, J.—In 1870 the plaintiff was duly appointed by the common pleas court of Macon county, having probate jurisdiction, guardian and curator of the minor heirs of Benjamin Stephens, deceased; and qualified, and entered upon the discharge of the duties, as such, and in April, 1875, he filed in said court, for the purpose of a final settlement, his account with said wards, and at the July term of said court, his final settlement was passed upon, and the court found that he was indebted to said wards in the sum of $245, and from the judgment of the court, he appealed to the circuit court of Macon county. Prior to said adjudication in the probate court, the defendant herein, Eli J. Newton, was appointed by said court guardian and curator of said minor heirs, and, as such, appeared in the probate court in said cause, and afterward by the circuit court, on his application, was made a party to the proceedings then pending in said court on appeal. He had witnesses subpœnaed and depositions taken in the cause, and on the trial thereof in said court, it was found that plaintiff was indebted to said wards in the sum of $245, and was ordered to pay said sum to said Eli J. Newton.

The petition alleged the foregoing facts, and also that Newton unlawfully procured his appointment as guardian and curator of said minors, and obtruded himself into said cause, both in the probate and the circuit court, and caused unnecessary costs to be incurred, and unlawfully procured the clerk of the circuit court to enter the order specifically requiring plaintiff herein to pay said sum of $245 and costs to Newton. It is also alleged, that when Newton was appointed guardian and curator, plaintiff had not resigned or been removed as such, but was still the guardian and curator of said minors, and the prayer of the petition is, that the order of said court be modified, and legally entered, to the end that plaintiff may, on payment of any

balance in his hands, receive a legal acquittance therefor, and that the costs so incurred by Newton be taxed and adjudged against him. The court sustained a demurrer to the petition, and the plaintiff has prosecuted his appeal to this court.

The petition is certainly of an extraordinary character. Here was a cause originating in the probate court of Macon county, into which Newton, it is alleged, obtruded himself, as guardian and curator, and from the judgment in which McGindley appealed to the circuit court of said county, where Newton again makes his appearance, and has himself formally made a party to the proceedings, as guardian and curator of the wards. Whether McGindley resisted the application of Newton to be made a party does not appear. It is very clear that the proper and only way to have corrected the error of the court, if any was committed in this respect, was by appeal; and this is the first time we have ever known a suit instituted by one party against his adversary in a former suit, to correct an error committed by the court in the trial of the other. Not only this, but one object of the present suit is to have a re-taxation of the costs of the former suit, and another is to correct an order of court, which it is alleged Newton procured the clerk of the circuit court to enter upon the records of said court. The means by which he unlawfully procured his appointment, or by which he induced the clerk to enter this order of record, are not stated, neither is it alleged that the order so entered, was not the very order made by the circuit court. No fraud is alleged against Newton. The most that is charged against him is an irrepressibility, which, in a good cause, is commendable. All that the petition states, in substance, is that Newton procured his appointment, and persistently obtruded himself into the cause in both courts; that the courts both erred in their judgments, as to the amount of balance found due from McGindley to his wards, and as to the person to whom it should be paid, and in the taxation of costs. An original suit against

his adversary in a former suit, is a novel way of re-taxing the costs of the former suit, and an unheard of proceeding to correct the record in a cause which has been determined. A suit will lie to set aside a judgment obtained by fraud, but here this is not alleged. For aught that appears in the petition, Newton merely solicited and urged the clerk to the performance of his duty, to enter an order made by the court in the cause. True, it is alleged that he unlawfully procured the clerk to enter the order, but whether lawfully or unlawfully, is a conclusion of law from given facts, and, therefore, the petition would have been equally as good if the word "unlawfully" were stricken out. The judgment is affirmed. All concur.

HILLEGAS, *Appellant*, v. STEPHENSON.

Promissory Note: PRINCIPAL AND SURETY. In the absence of a special agreement, the legal liability of the parties to a promissory note is to be determined by the relation they bear to the note, and the fact that one of them was the principal debtor and the others signed for his accommodation, will not change this rule or make the latter co-sureties as to each other. Hence, where one of two accommodation signers executed a note as joint maker with the principal debtor and the other as payee and indorser, and there was no special agreement between them; *Held*, that the former could not, after paying the note, call upon the latter for contribution.

Appeal from Henry Circuit Court.—HON. F. P. WRIGHT, Judge.

AFFIRMED.

M. A. Fyke for appellant.

If it was the understanding between plaintiff and defendant that they were both signing merely for the accom-

modation of Connor, then they are equally liable, and plaintiff having paid the whole amount, defendant is liable to him for one-half. *Warner v. Price*, 3 Wend. 397; *Norton v. Coons*, 2 Seld. 33; *Barry v. Ransom*, 12 N. Y. 462; *Craythorne v. Swinburne*, 14 Ves. 159; *Griffith v. Reed*, 21 Wend. 501. The evidence shows this was the understanding. Nothing more was necessary—no special agreement. The liability to contribution depends on principles of equity rather than on contract. *Campbell v. Mesier*, 4 John. Ch. 337.

R. C. McBeth and *S. B. Orem* for respondent, cited *McDonald v. Magruder*, 3 Pet. 474; Story on Prom. Notes, §§ 113, 135; Parsons Merc. Law, (2 Ed.) top p. 120; *McCune v. Belt*, 45 Mo. 174; *McCarty v. Roots*, 21 How. 432; *McNeilly v. Patchin*, 23 Mo. 40.

Norton, J.—This was an action against defendant for contribution as co-security on a promissory note. The note was executed by plaintiff and one J. R. Connor, as makers, and made payable to defendant, Stephenson. Stephenson, as payee named in the note, indorsed the note to the First National Bank, Clinton, Missouri. The bank discounted the note for the benefit of Connor—neither plaintiff nor defendant receiving any of the benefits of the note. When the note became due it was protested for non-payment, and within a few days thereafter plaintiff paid off said note to the bank, Connor, for whose sole benefit the note was made, being at that time insolvent. The cause was tried by the court without the intervention of a jury, and judgment rendered for defendant, from which plaintiff appeals, and assigns for error the action of the court in giving an instruction to the effect "that although plaintiff signed the note as an accommodation maker and merely as security for Connor, and defendant, the payee and indorser of the note, was only an accommodation indorser, by means of which Connor, as the sole principal,

procured the money from the bank, plaintiff could not recover, unless it further appeared that there was a special agreement between them that they should stand as co-securities and be liable to contribution."

This instruction presented the law governing the case and was properly given. An examination of the petition discloses the fact that the pleader or draftsman of it entertained the same view of the law, for after setting forth all the facts as to the execution of the note and its indorsement by the defendant, it is averred "that both plaintiff and defendant well knew and understood that said note was made for the accommodation of said Connor and that plaintiff and defendant were co-securities therein." The court in the instruction given adopted the theory of the case presented in the petition, and we think the theory was correct. Plaintiff, as maker of the note, assumed an unconditional obligation to pay it in the hands of the holder at maturity, whereas defendant being the payee, by his indorsement only assumed the obligation to pay the note if the makers did not upon due presentment and proper notice of default. Story on Prom. Notes, §§ 113, 135. In the case of *McCune v. Belt*, 45 Mo. 174, it was held "that in the absence of any special agreement the relation which parties to a note bear to each other is to be determined by the instrument to which they are parties. If they intend to be co-securities, they should so agree, or should be drawers merely." Judgment affirmed, in which all concur.

SMITH v. GREGORY, *Appellant.*

1. **Promissory Note**: ACTION. The fact that the same person is both co-maker and co-payee in a note, if he assign his interest to the other payee, will not prevent the latter from maintaining an action on the note alone.
2. **Administration**: PROMISSORY NOTE. If one of the administrators of an estate, upon final settlement, accounts in money for the full amount of a note belonging to the estate, and the settlement is accepted and the administrators discharged, the note, by operation of law, becomes his private property.
3. **Promissory Note.** If one of two payees in a note assign his interest in the note to his co-payee, the latter will be entitled to maintain an action upon it in his own name.

Appeal from Randolph Circuit Court.—HON. G. H. BURCKHARTT, Judge.

AFFIRMED.

M. Y. Duncan for appellant.

Brown and Smith, executors, could not sue Gregory & Brown, partners, on a note made by the firm to the executors. *Hill v. McPherson*, 15 Mo. 204; Coll. on Part., § 642, and note. The assignment by Brown of his interest in the note to Smith was nugatory. Being at the time co-administrator he could not, as such officer, divest himself of his interest in said note to his co-administrator without at the same time surrendering said office. So long as he was such co-administrator he would of necessity retain his interest in all choses of the estate, and after the attempted assignment the interest would be just what it was before. Having made full settlement of the estate with this note unpaid, the legal interest therein necessarily resulted to Brown and Smith jointly. Brown and Smith might have assigned to Smith, after settlement, so as to have enabled Smith to sue Gregory & Brown, but in no other way could this have been done. 1 Daniel Negot. Instr., §§ 683, 685.

Isaac W. Boulware for respondent.

After the administrators had accounted to the estate for the note sued on, had made final settlement of said estate and been discharged, the note became their absolute property, and either of the payees had the power and right to transfer the interest he had in the note to his co-payee. *Smith v. Oldham*, 5 Mo. 483; *Cook v. Holmes*, 29 Mo. 61; *Henderson v. Henderson*, 21 Mo. 379; *Shore v. Coons*, 24 Mo. 553; *Thomas v. Relfe*, 9 Mo. 373; *Lacompte v. Seargent*, 7 Mo. 351; *Jeffries v. McLean*, 12 Mo. 538. One of two payees may assign all his interest in the note to the other payee, who may then sue. 22 Mo. 347; 5 Mo. 483. Although Brown, one of the payees in the note, was a member of the firm of Gregory & Brown, the makers of the note, yet Smith, one of the co-payees and assignee of Brown, can sue at law on the note. *Kipp v. McChesney*, 63 Ill. 460; *Sherwood v. Barton*, 36 Barb. 284; *Smith v. Lusher*, 5 Cow. 688; *Davis v. Briggs*, 39 Me. 304; *Sidlin v. Williams*, 11 Cush. 108; *Thayer v. Buffum*, 11 Met. 108; *Pitcher v. Barrows*, 11 Pick. 361; *Temple v. Seaver*, 11 Cush. 314; *Young v. Chew*, 9 Mo. App. 387.

Ray, J.—This suit was brought upon the following promissory note, to-wit:

"One day after date, we promise to pay J. W. Brown and J. W. Smith, administrators of the estate of W. H. Smith, deceased, $650.00, for value received, negotiable and payable without defalcation or discount, with interest from date, at the rate of ten per cent until paid. September 1st, 1873.

"(Signed) Gregory & Brown."

On which was the following indorsement, to-wit:

"For value received, I assign and transfer to J. W. Smith my right, title, claim and interest in and to the within note drawn by Gregory & Brown.

(Signed) J. W. Brown, one of the
Administrators of W. H. Smith deceased."

The suit was originally brought in the Callaway circuit court, but afterward, by change of venue, transferred to and tried in the Randolph circuit court. The amended petition, upon which the case was tried, charged that Wm. H. Smith, late of Callaway county, departed this life intestate, in August, 1871; that the plaintiff Smith and defendant Brown were duly appointed administrators of his estate in October, 1871; that they qualified and entered on the discharge of their duties as such; that on the 1st day of September, 1873, the defendants, who were partners in trade, and constituted the firm of Gregory & Brown, by their firm name made, executed and delivered to said administrators their said promissory note, as above set out, by which they promised, for value received, to pay said administrators the sum of money as therein mentioned and described; that in August, 1874, said administrators made final settlement of their administration of said estate, and were, thereupon, duly discharged; that the plaintiff Smith prior to said final settlement, and out of his own private means, had accounted to said estate for said promissory note, and all interest thereon; that said J. W. Brown, for value received, assigned and transferred to the plaintiff all his right, title, interest and claim in and to said note; that the plaintiff now is, and ever since said assignment, accounting and final settlement of said estate, has been the legal holder and owner of said promissory note; and that the same and all interest thereon yet remains due and owing to this plaintiff, and for which he asks judgment against said defendants, and costs of suit, etc.

To this petition, the defendant Gregory filed his separate answer, denying that defendants, by their firm name, executed the note sued on, or that he made or authorized any person to make the same; and further denying each and every allegation therein. And for a further answer he says that said note was not made with his knowledge or consent; nor in settlement of any transaction within the scope or contemplation of said partnership of said firm

of Gregory & Brown; nor was it made during the existence of said partnership, but long after its dissolution, as plaintiff well knew; and further, that it was made in payment and settlement of the individual debt of said defendant Brown, and for moneys he had collected as administrator of said estate of W. H. Smith, deceased, as plaintiff, his co-administrator, well knew at the time he received it from said Brown, by virtue of said assignment, as well as the date thereof.

To this answer plaintiff replied, denying all its allegations. Defendant Brown made no defense.

At the trial of the cause before a jury, the evidence showed that in October, 1871, the plaintiff, J. W. Smith, and defendant, J. W. Brown, were duly appointed administrators of the estate of W. H. Smith, deceased; that they accepted the trust and entered upon the discharge of its duties, and that in August, 1874, they made final settlement of their administration of said estate, and were, thereupon, duly discharged. It also appeared that in 1871 the defendants had formed a partnership, under the firm name of Gregory & Brown, for the purpose of selling merchandise and dealing in produce; that the partner Gregory furnished the means, and the partner Brown did the business; that in March, 1873, the firm sold out their store, but continued their partnership business, in dealing in leaf tobacco, until November or December, 1873; that after the sale of their store in March, 1873, and for the purpose of continuing their partnership operations in leaf tobacco, the partner Gregory furnished the partner Brown between $2,000 and $3,000, and told him, if they needed more, they would have to borrow it. It further appeared that Brown, as one of the administrators of said Smith's estate, had collected funds of said estate, and deposited them with the firm of Gregory & Brown, and charged the same to said firm, on its books, and that he, also, as occasion required, paid off claims, due by said estate, with the funds of Gregory & Brown, and kept account thereof on the books of

said firm; and that the firm of Gregory & Brown had used the funds of said estate, so collected and deposited, in their partnership operations, in dealing in leaf tobacco; and that the promissory note in question was given for the balance of the funds of said estate, as used by said firm in their partnership operations, as aforesaid; the partner Brown testifying that he had authority from his partner Gregory so to use said funds and to execute said note therefor. It also appeared that plaintiff Smith, out of his private means, had accounted to said estate of W. H. Smith for the full amount of said note and interest, in said final settlement of said estate, said plaintiff also testifying that some time in October, 1873, he called on the defendant, Gregory, and told him he held said note, and wished to make final settlement of said estate in November, 1873; but that Brown said it would not be convenient for Gregory & Brown to pay the note, and that he further told Gregory that if it would be all right, he would pay the amount out of his private means and hold the note; and that Gregory said, if Brown had made the note of Gregory & Brown, it would be all right. Plaintiff further testified that he thereafter, out of his private means, accounted for said note, to said estate, in his said final settlement, and obtained the said assignment thereof from his co-administrator, for value.

The defendant Gregory testified, that he had no knowledge of the use of said funds belonging to said estate, in said partnership operations; that he never authorized or consented to their use; that said transaction was outside the scope of said partnership business; that after the sale of their store in March, 1873, he only authorized dealing in leaf tobacco, when one of their customers chose to do so in settlement of his account; that said note was not given until after the dissolution of said firm of Gregory & Brown, and was made by said Brown without authority and in settlement of his own individual debt; said defendant also denied the alleged conversation between

him and plaintiff, as testified to by the plaintiff. There was also other testimony given at the trial, tending, in a general way, to prove the several issues on both sides.

At the close of the testimony, the court, against the objections of the defendant, gave the following instructions for plaintiff, to-wit: 1. If the jury believe from the evidence that J. W. Brown executed said note in the name of Gregory & Brown, for a debt owing by the firm of Gregory & Brown, and the consideration for which said note was given, was applied to and used for the benefit of said firm during the partnership, they will find for the plaintiff.

2. If J. W. Brown assigned and delivered said note to plaintiff, he is the proper person to sue for the same.

3. If defendant Gregory had knowledge of the existence of said note, and, before plaintiff purchased the same, told plaintiff that it was all right, and plaintiff was then induced to purchase the same, he cannot now deny plaintiff's right to recover herein on said note.

4. If the jury believe from the evidence that Gregory & Brown were partners, trading and doing business as merchants, or in buying tobacco, and while so engaged as such partners, the note was executed by Brown, one of said partners, for the benefit of said firm or for money used in the business of said firm, they will find for plaintiff.

5. If defendant Gregory had knowledge of the existence of the note sued on and told plaintiff, before he purchased the same, that it was all right if Brown signed the firm name to it, and they find that Brown did execute the note in the firm name of Gregory & Brown, and plaintiff was thus induced to purchase the same, defendant Gregory cannot now deny plaintiff's right to recover herein on said note.

6. If the jury believe from the evidence that the note was, for value, delivered to the plaintiff, the title to the same passed from the date of the delivery, and plaintiff's

rights are not prejudiced from the fact that it may have been assigned after such delivery.

7. If defendant Brown borrowed the money and used it for the benefit of the partnership, he had the right, as a member of the firm, to execute the note of the partnership for the same without any special authority from defendant Gregory so to do, during the existence of the partnership.

8. If they believe from the evidence that Brown executed the note by authority of Gregory, they will find for plaintiff.

9. If the jury believe from the evidence that the note was signed by Brown in the name of Gregory & Brown, without the knowledge or consent of Gregory, yet if they further find that Gregory afterward ratified it, they will find for plaintiff.

The court, at the instance of defendant, gave the following instructions, to-wit: 1. If the note here sued on was executed by defendant Brown, without the knowledge or consent of defendant Gregory, in payment of money due the estate of W. H. Smith, and which had come into the hands of said Brown as administrator, the said Brown, being one of the payees of said note, took the same with full knowledge that said note was not given for any transaction within the scope of said partnership, and was a fraud upon said firm, and the plaintiff having received said note by assignment from said Brown, his co-administrator, after its maturity, took the same with full knowledge of the fraud, and that said note is not binding on said firm, and the jury will find for defendant Gregory.

2. If the note here sued on was executed by defendant Brown, one of the partners of said firm, without the knowledge or consent of defendant Gregory, the other member, and after the dissolution of the firm, the jury will find for defendant Gregory, unless he afterward ratified it.

But the following instructions, asked by defendant, were refused, to-wit: 3. One partner cannot make a con-

tract outside the scope of the partnership so as to bind the other members, and if the jury shall believe from the evidence that the note here sued on was given for money deposited with J. W. Brown by plaintiff, they will find for defendant.

4. Although the jury may believe from the evidence that after defendants made sale of their stock of goods to Washington & Leavell, said firm did buy tobacco in settlement of debts due them and in order to wind up their partnership business, yet such buying did not create a new partnership, but was only a means used by said firm for settling their business, and the jury will find for defendant Gregory.

5. If the jury believe from the evidence that J. W. Brown was, at the time the note was executed, both a member of the firm of Gregory & Brown and also co-administrator with plaintiff Smith, of the estate of W. H. Smith, deceased, and that said note was not assigned by said Brown to plaintiff until after the dissolution of the firm of Gregory & Brown, they will find for defendant Gregory.

6. Although the jury may believe from the evidence that defendant Brown, as one of the co-partners and the business manager of the firm of Gregory & Brown, acting in the name of said firm, received on deposit from defendant Brown and plaintiff Smith, administrators of the estate of W. H. Smith, deceased, or collected on claims due said administrators, the money described in plaintiff's petition, and used it in the business of said firm, they will find for defendant Gregory, unless they find from the evidence that the note described in said petition was executed and delivered by defendant Brown to said administrators before the dissolution of the firm of Gregory & Brown, and in addition thereto one of the following facts, to-wit: Either that the collection of claims and receiving of money on deposit were within the scope of the business of said co-partnership, or else that defendant Gregory consented to or had knowledge of such collection of claims and reception of said money on deposit at the time thereof, or unless they

further believe from the evidence that defendant Gregory consented to or had knowledge of the execution and delivery of said note by defendant Brown to said administrators at the time thereof, or that he afterward consented to or ratified it.

The jury found the issues for the plaintiff, and judgment was rendered accordingly. The defendant Gregory, after an unsuccessful motion for a new trial, brings the case here by appeal.

Such is the record in this cause. The jury are the proper triers of the facts of a case; and when, as in this case, there is evidence, on both sides, tending to prove the respective issues, in support of which it is offered, the settled rule of this court is not to disturb their finding, unless there has been some error of the court in its rulings in the progress of the trial, or in the instructions, materially affecting the case, to the prejudice of the appellant. We will, therefore, limit our inquiry to the latter question, and see if any such error is apparent in this record.

The recent case of *Faulkner v. Faulkner*, 73 Mo. 327, in some respects, is very much like the case at bar. The following is a copy of the note sued on in that case:

1. PROMISSORY NOTE: action.

ST. LOUIS, Mo., October 1st, 1875.

One year after date, I promise to pay to the order of J. D. Faulkner and C. C. Bland, executors, $4,500, for value received, with interest from date, at the rate of ten per cent per annum, at the Security Bank. If interest is not paid annually, same to be added to principal and bear the same rate of interest.

(Signed) J. D. FAULKNER.
D. W. FAULKNER.
H. M. NOEL.
ALEX. DEMUTH.

The suit, as originally brought, was in favor of the payees therein, and against all the makers; but in the prog-

ress of the trial, it was dismissed as to the defendant J. D. Faulkner, who was one of the plaintiffs, and also one of the makers and payees of the note. At the trial of that suit, it was objected that the note in question was incompetent to show any liability on the part of the defendants to that action. In the disposition of that case, the court had occasion to consider and discuss questions growing out of the position and relation of the parties to that instrument, which, in some respects, are kindred to those arising in this case. In that case, the court, speaking through SHERWOOD, C. J., uses this language: "The authorities for defendants abundantly show that a party, bound in a contract with others whereby he becomes both obligor and obligee, cannot maintain, on said contract, an action at law; cannot, in a word, sue himself. This principle, however, does not apply, even at common law, except where the contract is joint, and not where it is (as are all contracts in this State) both joint and several. Thus, where an action was brought by A and B, payees of a joint and several note, against C, one of the makers, and it was pleaded that said note was made by B, one of the plaintiffs, the defendant and another; and upon argument, the case of *Moffatt v. Van Millengen*, 2 Bos. & P. 124n, and other similar cases, were discussed, and the plea was held bad. This was upon the ground that the cases just cited were distinguishable from that one; that the contract sued upon was the several contract of the defendant, and the fact that there was also upon the instrument a joint contract by the makers, was no defense; that practically, there were three promissory notes, signed by three different parties; and that the note declared on, was not that signed by the plaintiff, Smith; but that signed by the defendant. But it was freely conceded then, that if the note were merely a joint contract, it would not be enforcible at law. *Beecham v. Smith*, E. B. & E. 442. To the same effect are *Winter v. White*, 1 Brod. & Bing. 350; *Bedford v. Benton*, 1 Bing. (N. C.) 399; Leake on Cont., 440. Testing the case at bar by

the rule just announced, no question can arise but that the note in suit, being the joint, as well as several contract of each and all whose names are signed thereto, an action is maintainable in favor of the plaintiffs, and against defendants even at law."

In the case at bar, as we have seen, the partnership firm of Gregory & Brown appeared as the makers of the note in suit, which was payable to J. W. Smith and J. W. Brown as administrators of the estate of W. H. Smith, deceased. Brown was both maker and payee in the note; but not a party plaintiff to the action; having, prior to its institution, transferred by assignment to his co-payee, the plaintiff, whatever interest, if any, he had therein. The evidence, as we have seen, showed that there had been a final settlement of said estate of said Smith, and that said administrators had been fully discharged from said administration before the suit was brought. The evidence, as before remarked, also tended to show that some time prior to said final settlement, and preparatory thereto, an arrangement was made between said Smith, (the plaintiff and one of said administrators,) and the said firm of Gregory & Brown, and for their accommodation, by which said Smith out of his own private funds, accounted to said estate for the full amount of said note, and by which also, he held the note thus accounted for in said final settlement.

At the trial, defendant Gregory objected to the introduction of this note in evidence, on the ground that but one of the payees therein was party plaintiff, and for the reason that the same was irrelevant and incompetent; and also, for the further reason, that an assignment, by one administrator to his co administrator, of a note made to them jointly, as such, was a nullity and passed no interest. But the court overruled these objections. These objections, we think, under the facts of this case, were not well taken.

After the plaintiff, Smith, had accounted to said estate for the full amount of said note, as stated, and after said

2. ADMINISTRATION: promissory note.

final settlement had been so made, and the administrators discharged, as aforesaid, the note in question, by operation of law, became the private property of the plaintiff, Smith, divested of its fiduciary qualities, and he had a clear right to bring and maintain this action.

Besides that, it has frequently been held that one of two payees in a note may assign all his interest in said note to his co-payee, who may sue as the legal owner of the note. *Smith v. Oldham*, 5 Mo. 483; *Canefox v. Anderson*, 22 Mo. 343. The defendant Brown made no defense to the action—was a witness in the cause—does not join in this appeal, and is not here complaining of this judgment. Under all the circumstances of the case, the verdict and judgment seem to be for the right party, and as no error materially affecting the rights of the appellant, to his prejudice, appears in the rulings of the trial court, its judgment is affirmed. All the judges concur.

3. PROMISSORY NOTE.

RYAN v. GILLIAM *et al.*, *Appellants.*

The judgment of the court below enjoining a sale under a deed of trust is affirmed, on the ground that the note which the deed of trust was given to secure, was without consideration.

Appeal from Saline Circuit Court.—HON. WILLIAM T. WOOD, Judge.

AFFIRMED.

This was a suit by Matthew Ryan to enjoin Gilliam & Doak from enforcing a deed of trust given by him to secure a note for $4,500. The facts were briefly these: Gilliam & Doak, who were bankers, held a note for $1,000 made

by James B. Ryan, a brother of plaintiff, and Edward Langan, and also a note for $2,012 made by James B. Ryan and Langan, and purporting also to be signed by plaintiff. About the time these notes came due, James B. Ryan represented to Gilliam & Doak that he was shipping cattle to St. Louis and needed some money to pay expenses, and also wished to take up the above mentioned notes, and requested them to advance him $4,500 for these purposes upon a draft which he would draw on his commission merchant in St. Louis. They consented and furnished the money on the draft, at the same time surrendering the notes. No cattle were shipped, and the commission merchant refused to pay the draft. Thereupon Gilliam & Doak obtained from plaintiff the $4,500 note and deed of trust in question. In this suit plaintiff claimed that he had never signed the $2,012 note, and that the $4,500 note and deed of trust were obtained through fraud and imposition practiced upon him, and by holding out threats of a criminal prosecution against James B. Ryan if his indebtedness was not settled, and promises of immunity if it was settled. Plaintiff had judgment, and defendants appealed.

W. H. Letcher and *Samuel Boyd* for appellants.

Chas. A. Winslow for respondent.

SHERWOOD, C. J.—The decree of the circuit court enjoining the sale of the land conveyed by the deed of trust, executed to Andrew Holmes by Matthew Ryan, to secure his note for $4,500, may well be upheld on this ground; that such note was without consideration. The only valid and valuable consideration which could have moved Matthew Ryan to the execution of the deed of trust and the note for $4,500 secured thereby, was the fact of his having signed as surety the note for $2,012. But this note Ryan swears emphatically he never signed. This positive testimony is not countervailed by the testimony of Woodbridge, who testified that he did not see Matt. Ryan sign the note;

that he can't say positively that it is his signature, but thinks it is; that he has no recollection of seeing Matt. Ryan sign the note, but could almost swear that he did sign it. Besides, both witnesses were before the court, and even if the testimony were evenly balanced as to the execution of the note, we should in accordance with our prior rulings defer to the finding of the trial court. This has been our custom unless there was some other evidence or circumstance, or some intrinsic improbability in the testimony which would induce us to arrive at a conclusion at variance with that arrived at by the trial court. Therefore, judgment affirmed. All concur.

ROWLAND v. THE CITY OF GALLATIN, *Appellant.*

Municipal Corporation: TRESPASS BY CITY OFFICER. If a city officer takes earth from private property and uses it in improving a street of the city without any provision in the charter or elsewhere authorizing such a proceeding, it is a trespass, for which the officer will be individually liable, but not the city.

Appeal from Daviess Circuit Court.—HON. S. A. RICHARDSON, Judge.

REVERSED.

Wm. D. Hamilton for appellant.

Kost & Shaw for respondent.

HOUGH, J.—This is an action against the defendant for wrongfully moving earth from plaintiff's premises and digging a ditch thereon for the purpose of constructing a highway over the same. The premises alleged to have been trespassed upon and injured, lie within the corporate limits of the city of Gallatin. The injuries complained of

were done by the street commissioner of the city of Gallatin, under the verbal direction of the mayor. The plaintiff showed a paper title to the premises in question, and the defendant offered testimony tending to show that said premises constituted part of a public highway. The defendant asked the following instruction, which was refused: "The court declares the law to be that the defendant could work public roads only by virtue of an ordinance, and that unless there was an ordinance requiring and directing the supervisor of streets to perform the work complained of in plaintiff's petition, the plaintiff cannot recover." No instructions were asked by the plaintiff. The court rendered judgment for the plaintiff.

It is evident that the court found that the premises trespassed upon constituted no part of the public highway, otherwise judgment could not have been rendered in his favor. Conceding the plaintiff's claim in this regard, and the finding of the court thereon to be correct, still, there is no authority in the charter of the city of Gallatin, or elsewhere, for the officer of the city, in pursuance of an ordinance, or otherwise, to enter upon private property and remove earth or other material therefrom, or in any other manner interfere therewith, for the purpose of improving the streets of said city, and the city cannot, therefore, be held liable for the acts charged. *Thomson v. The City of Boonville*, 61 Mo. 283; *Hunt v. The City of Boonville*, 65 Mo. 620. The individuals committing the trespass are alone liable. The judgment of the circuit court will be reversed. The other judges concur.

SCOTT v. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant.*

Railroads: KILLING STOCK: PLEADING. The fact that the petition in an action against a railroad company for killing stock closes with a prayer for double damages, will not prevent recovery of single damages if the petition states a cause of action either at common law or under the 5th section of the Damage Act, and there is nothing besides the prayer to show that plaintiff intends to claim under the 43rd section of the Railroad Law.

Appeal from Jefferson Circuit Court.—HON. L. F. DINNING, Judge.

AFFIRMED.

This was an action to recover damages for killing plaintiff's mare. The petition was as follows: "Plaintiff says that defendant is now and was, etc., a railroad company, etc., and that on the 1st day of June, 1877, an engine and train of cars attached thereto, while being run on said railroad of defendant, which engine and train of cars were also owned by defendant, and were being then and there run by defendant, its servants and agents and employes, at a point on said railroad in Joachim township, in Jefferson county, Missouri, where the said railroad was not inclosed on either side thereof by any fence, and at a point thereon where there was not a public crossing of said railroad, and not within any incorporated town or city, was, that is to say, said engine and train of cars were by gross carelessness of defendant, its agents, servants and employes, run against and over one mare, the property of plaintiff, which had strayed to and got upon the track of defendant's said railroad, which mare was of the value of $100, and was then and there killed by said engine and train of cars, and by which plaintiff has sustained damage in the sum of $100 and for double which, plaintiff asks judgment." The justice rendered judgment for plaintiff.

This judgment was by the circuit court affirmed, on motion of the plaintiff, for want of proper notice of appeal.

Wm. R. Donaldson and *Smith & Krauthoff* for appellant.

Joseph J. Williams for respondent.

SHERWOOD, C. J.—It is not contended by counsel for defendant, that the judgment of the justice was not rightfully affirmed, so far as concerns the mere practice relating to appeals from justices' courts.

We are to look, then, to the sufficiency of the statement filed with the justice. We are not prepared to say that it absolutely fails to state a cause of action, either at common law, or under the 5th section of the Damage Act. It is true, there is a prayer for double damages, but the 43rd section is nowhere mentioned in the statement, and the prayer should not be permitted to overthrow a statement otherwise sufficient. It is necessary, to a recovery under the 5th section aforesaid, that the point at which the accident occurs should not be "inclosed by a lawful fence," nor be "on the crossing of any public highway." An allegation of this kind appears in the statement, and one also charging gross carelessness on the part of defendant's servants in running the train, resulting in the killing of plaintiff's mare. We think, therefore, the statement a good one, at least so far as stating a cause of action is concerned, and it is too late, after a judgment of affirmance occurs in the circuit court, to object, because of mere formal defects. Holding these views, we affirm the judgment of the circuit court. All concur.

KELLEY v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant.*

1. **Railroad**: NEGLIGENCE: CONTRIBUTORY NEGLIGENCE. It is well settled that it is such negligence for one to attempt to cross or get upon a railway track at a public crossing or elsewhere, without looking and listening for an approaching train, as precludes a recovery for an injury sustained by him from a passing train or locomotive, whether the company's negligence also contributed directly to produce the injury or not; but there is this qualification to this rule: If the negligence of the company, which contributed directly to cause the injury, occurred after the party injured was, or by the exercise of proper care might have been, discovered on the track by the company's trainmen in time to stop the train and avert the calamity, the company is liable, however gross the negligence of the injured party may have been in placing himself in danger.

2. ——: ——: UNLAWFUL SPEED. The mere fact that a train is run through a city at a greater rate of speed than is allowed by ordinance, will not authorize a party injured to recover. There must be evidence connecting the violation of the ordinance with the injury, as a cause.

   The same is true as to failure to comply with the law requiring the bell to be rung.

3. ——: ——: CONTRIBUTORY NEGLIGENCE. It is not sufficient to exonerate a party from a charge of contributory negligence in attempting to cross a railway track in the face of an approaching locomotive, to show that he might reasonably have supposed that if the locomotive ran at its usual and lawful rate of speed for that place he could cross without harm. He has no more right to presume that the men in charge of the locomotive will obey the requirements of the law than they have, that he will obey the instinct of self-preservation and not unnecessarily thrust himself into danger.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON, Judge.

REVERSED.

Chas. A. Winslow for appellant.

Belch & Silver and *Tichenor & Warner* for respondent.

HENRY, J.—This action was commenced in the special law and equity court of Jackson county, and removed by change of venue to the circuit court of said county. The plaintiff claimed, and recovered damages for an injury sustained by him in being run against by a locomotive of defendant, at a point where defendant's stock-yard track, in Tenth street, crosses Mulberry street, in Kansas City. From the judgment he obtained, defendant has appealed.

From the evidence for plaintiff, it appears that he was struck in the square formed by a street-car track which crosses the Hannibal track, in question; that he stepped upon the track without looking or listening for an approaching train. There were four railroad tracks in Tenth street, occupying most of the street, of which the defendant's stock-yard track was the southern. The plaintiff was crossing Tenth street from the south, and had passed over defendant's track. A train was coming in on the Kansas Pacific track, from the west, but the locomotive which ran against plaintiff, coming in the same direction passed it and reached the Mulberry street crossing where the accident occurred, first. The whistle on this locomotive was not blown, nor the bell rung, and the speed at which it approached the crossing was about ten or twelve miles an hour. Plaintiff's granddaughter testified for him that she witnessed the tragedy, and that she saw him get upon the track; that she "first noticed him near Mulberry street; he had crossed the block, and was going along near Tenth street. Did not see him stop at all. The engine was very close to him when he stepped up, and by the time he got there, (indicating the center of the square formed by rails of a street-car track crossing the defendant's stock-yard track in question,) the engine caught him. The engine was not far back when he stepped up; couldn't say how far, but it was quite near." Another witness for plaintiff testified, that he witnessed the accident; that the servants of defendant on the locomotive were not in their

proper places; that he saw nobody on the engine, but he signaled it with a bucket he held in his hand. He further says: "I saw him, and in a second he was struck."

That it is such negligence for one to attempt to cross, or get upon a railway track, at a public crossing, or elsewhere, without looking and listening for an approaching train, as precludes a recovery for an injury sustained by him from a passing train, or locomotive, whether the company's negligence also contributed directly to produce the injury or not, has so often been decided by this court, that it must now be regarded as the settled law of this State. *Maher v. R. R. Co.*, 64 Mo. 267; *Fletcher v. R. R. Co.*, 64 Mo. 484; *Harlan v. R. R. Co.*, 65 Mo. 22; *Harlan v. R. R. Co.*, 64 Mo. 480; *Zimmerman v. R. R. Co.*, 71 Mo. 476; *Moody v. R. R. Co.*, 68 Mo. 470; *Bell v. R. R. Co.*, 72 Mo. 50; *Purl v. R. R. Co.*, 72 Mo. 168; *Adams v. R. R. Co.*, 74 Mo. 553. This qualification is, however, recognized, that if the negligence of the company which contributed directly to cause the injury, occurred after the party injured was, or by the exercise of proper care, might have been, discovered upon the track by defendant's servants in charge of the train, in time to stop it and avert the calamity, the railroad company is liable, however gross the negligence of the injured party may have been, in placing himself in his dangerous situation. *Maher v. R. R. Co.*, *supra*; *Harlan v. R. R. Co.*, 65 Mo. 22; *Adams v. R. R. Co.*, *supra*.

1. RAILROAD: negligence: contributory negligence.

That the plaintiff was guilty of such negligence as precludes his recovery, is manifest, unless defendant's negligence, after he was, or might have been, discovered on the track by the defendant's servants, in charge of the locomotive, was such as to render the company liable, without regard to his own negligence. From the evidence, it appears that he was instantly struck after he got upon the track. This is the testimony of his granddaughter. The other witness, who signaled the locomotive, says he saw the man, and that he was struck in a second after. He

made the signal after he saw the plaintiff on the track, and, in a second after he saw the plaintiff the injury occurred. It is very evident that this witness did not speak of the interval which elapsed between the time he saw plaintiff on the track and the moment he was struck, from a time-piece, but it was a form of expression adopted by him to convey the idea, that there was but an exceedingly brief interval between the two events. This is a fair inference from his testimony, taken in connection with that of plaintiff's granddaughter. Plaintiff introduced no evidence to show within what time the engine could have been stopped. It is beyond controversy, that if plaintiff had looked, he would have seen the locomotive approaching. His own testimony proves his negligence, and also tends to prove that he stepped upon the track when the locomotive was so near him that no possible exertion which the servants of defendant in charge of the locomotive could have made, would have averted the calamity, even had they seen him on the track before he was struck by the locomotive. We have stated the substance of all the evidence introduced by plaintiff relating to the negligence of plaintiff and defendant's servants respectively, and adhering to the doctrine announced in the cases above cited, are of the opinion that the circuit court should have sustained defendant's demurrer to plaintiff's evidence.

This error would lead to a reversal of the judgment, if, on cross-examination of defendant's witnesses the testimony which plaintiff failed to introduce, had not been supplied. The engineer on the locomotive in question testified, that it could have been stopped in eight or ten feet. If running at twelve miles an hour, it would be at the rate of about sixteen feet per second. If the engineer and fireman had been at their places, and keeping such lookout as was their duty, in running through a populous city and approaching a public crossing, on one of its thoroughfares, the evidence tends to show that they would have seen the plaintiff, as he stepped upon the track, and could have

stopped the locomotive before it struck him. The engineer testified that plaintiff was nine or ten feet from the engine when he first saw him. He further says: "We had no steam up. An engine going that way, could be stopped very quick. I can't say in how many feet. I think I said before in six feet. I say eight or ten feet now. We could have stopped it quicker, if we had known that we were to stop right then." From all the evidence, it is by no means a forced deduction, that, if the engineer and fireman on the locomotive had each been at his proper place, and running with that care and watchfulness which is demanded of them in running through the streets of a populous city, they would have observed this man on the track, or as he was stepping upon it, in time to have prevented this accident, by prompt action on their part. Therefore, we cannot reverse this judgment for the error committed by the court in overruling the demurrer to plaintiff's evidence.

Defendant complains of the first instruction the court gave for plaintiff, which declared "that it was negligence for defendant to run its locomotive engine in the City of Kansas, at a rate of speed exceeding six miles an hour." Abstractly, this was correct. There was an ordinance of the city, which it was authorized to pass, prohibiting a greater rate of speed, but, unless there was evidence to connect with the accident, the violation of the ordinance, as a cause, it was no ground for recovery.

2. ——, ——: unlawful speed.

The objection urged to the other instructions, except three, four, six and seven, is, that there was no evidence in the case tending to prove, that after plaintiff got upon the track, there was an intervening period of time between that and the collision, within which defendant's servants, in charge of the locomotive, could have discovered him on the track and stopped the locomotive before it struck him. This is answered by what is before said in relation to the demurrer to the evidence.

The third given for plaintiff is erroneous. It allowed

the jury to find for plaintiff if they found that defendant's servants failed to ring the bell, whether the injury to plaintiff was occasioned by such failure or not.

The fourth declared "that while plaintiff, in crossing the railway of defendant, was bound to use care, etc., and under ordinary circumstances was bound to use his ears and eyes, yet, if plaintiff, while carefully watching, and keeping out of the way of, the Kansas Pacific train, stepped back upon the track of defendant, and was run against by defendant's engine, which was backing at a greater rate of speed than six miles per hour, and upon which no bell was ringing, then you can take these matters into consideration in determining whether or not plaintiff did use the care and caution to avoid danger he ought to have done, under the circumstances." The objection urged is, that there was no evidence to support the instruction. Counsel, in making the objection, have certainly overlooked the testimony of the engineer. It was as follows: "Kelley told me when he got up, he was stopping there, saw the Kansas Pacific train, and that he heard my bell and was waiting for Kansas Pacific train to pass. My bell was ringing, and hearing it he stepped back on it," (the track). We think the evidence warranted the instruction. We do not pass upon the weight of the testimony on any issue of fact, but only on its tendency. This instruction has, however, a vice which the seventh, hereafter to be considered, contains.

3 ——-:——: contributory negligence.

In the sixth instruction for plaintiff the jury were told that in determining whether plaintiff exercised such care as ought to have been reasonably expected from one in his situation, they might take into consideration whether or not, even if he looked up the track and saw the engine which struck him, it was at such a distance that, with its usual and lawful rate of speed at that place, he might reasonably have supposed that he could have crossed without harm. This is in direct conflict with *Moody v. R. R. Co.*, 68 Mo. 470, and besides, is

wholly unwarranted by any evidence in the case, and contradicts the very theory upon which plaintiff has based his right of recovery. It is not pretended that he was attempting to cross the defendant's track. His own testimony shows that he had crossed this track, on his way home, and the reasonable inference from all the evidence, is, that he stepped upon defendant's track to wait until the train on the Kansas Pacific passed. But, whether he was attempting to cross or not, no one can make such a venture and recover damages for an injury sustained in consequence of its failure. If the locomotive is so near him that he deems it necessary to enter into such a calculation of chances, it is then conclusive that an attempt to cross its path is recklessness. He has no more right to presume that the servants in charge of the locomotive will obey the requirements of the law, than they have, that he will obey the instinct of self-preservation, and not thrust himself into danger unnecessarily.

We also think that the seventh instruction for plaintiff was not applicable to the case, made by the evidence. It would be applicable in a case where the negligence of the defendant had placed the plaintiff in a situation of danger, but not when he has voluntarily and unnecessarily placed himself in this peril. If he stopped for the Kansas Pacific train to pass, there was a place of safety for him in the space between the tracks. He had no occasion to get upon the defendant's track. There was nothing in the approach of the Kansas Pacific train to frighten him. It was running slowly, and plaintiff had been in the habit of passing over the crossing, and knew that it was not unusual for trains to pass there. Neither his hearing, vision nor intellect was impaired by old age or other infirmity. If he had exercised ordinary prudence under the circumstances in which he was placed, the accident would not have occurred; but, as before stated, the failure to exercise such prudence will not prevent his recovery, if the servants of the defendant saw him, or might have seen him on the

track, in time to prevent the accident; if they had been at their posts, discharging their duty.

For the errors above noticed, the judgment will be reversed and the cause remanded. All concur, NORTON, J., in the result.

THE CITY OF ST. LOUIS v. SPIEGEL, *Appellant.*

Meat-shop License: UNIFORMITY OF TAXATION. A license fee imposed upon the keepers of meat-shops is a tax, and must be uniform within the territorial limits of the authority imposing it. Const. 1875, art. 10, § 3. A city ordinance, therefore, which requires a license fee of $100 in one part of the city and $25 in the rest, is void.

Appeal from St. Louis Court of Appeals.

REVERSED.

Jas. C. McGinnis for appellant.

L. Bell for respondent.

SHERWOOD, C. J.—The defendant, convicted in the police court for violating ordinance No. 10,384, known as the meat-shop ordinance, was successful, on appeal to the court of criminal correction, in his motion to dismiss, on the ground that the ordinance was in conflict with that section of the constitution of the State which provides that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." § 3, art. 10, Const. The point upon which this case hinges, is, therefore, this: Is the fee which the ordinance imposes, as a prerequisite to obtaining a license, a tax? If it is, then the ordinance cannot stand against the prohibition of the constitution.

This constitutional provision is a new one, and has

never been passed upon by this court. And it is evidently intended to apply to matters other than those embraced in the next succeeding section of the same article, where it is provided that: "All property subject to taxation shall be taxed in proportion to its value." § 4. This last section, which was obtained from the constitution of 1865, (art. 1, § 30,) plainly applies to a *property tax*; to cases where there is specific and tangible property, capable of valuation, and, consequently, of being taxed in proportion thereto. Not so, however, with the section under consideration. If that section relates to the uniformity of taxation to be levied directly upon *property*, then it is obvious that either that section or section 4, *supra*, is superfluous. We do not regard either section in that light. But while section 3 does not apply to a tax on property, it gives recognition to the same idea of equality and uniformity, by preventing *discrimination* between objects belonging to the "same class of subjects within the territorial limits of the authority levying the tax."

Is, then, the license fee a tax within the meaning of the 3rd section, *supra?* And does the ordinance which authorizes its collection discriminate in favor of some subjects and against others of the same class? That the license fee is a tax when imposed for the main purpose of revenue, is established by abundant authority. Dillon Munic. Corp., § 768; *Ward v. Maryland*, 12 Wall. 418; Cooley's Const. Lim., pp. 201, 494; *North Hudson v. Hoboken*, 41 N. J. L. 71; *Glasgow v. Rowse*, 43 Mo. 479; Cooley on Taxation, 403, *et seq.*; and it is competent for the courts to make examination and see if, under a mere power to *license*, the power of taxation for revenue is exercised. *Burlington v. Ins. Co.*, 31 Iowa 102; *Muhlenbrinck v. Commissioners*, 42 N. J. L. 364; *s. c.*, 36 Am. Rep. 518. In this case it is apparent at first blush that the license fee is imposed for the purpose of revenue. That such fee is also imposed for the purpose of *regulation* does not deprive it of the salient characteristics of a tax.

Regarding the license fee as a tax, does the ordinance which authorizes the collection of such fee conform to the constitutional provision contained in section 3, above quoted? Manifestly, it does not. Manifestly, it *discriminates* in favor of meat shops in one portion of the city, and against others in another portion thereof; imposing in the first instance a tax of $25, and in the second a tax of $100. The case of *American Union Ex. Co. v. St. Joseph*, 66 Mo. 675, and that of the *City of St Louis v. Sternberg*, 69 Mo. 289, although treating of that provision of the constitution of 1865 corresponding with section 4, *supra*, yet distinctly recognized the principle that taxation even upon occupations and professions, trades and callings should be uniform; *i. e.*, that all persons engaged in the same business should be taxed alike. In the case of the *City of St. Louis v. Green*, 70 Mo. 562, we held valid an ordinance which imposed a license tax on vehicles using the streets of that city; but the ordinance then before us for consideration contained nothing looking in the remotest degree to a *discrimination* between the amounts of taxation imposed upon the "*same class of subjects;*" and therein consists the broad difference between the ordinance in *Green's case* and the ordinance in question.

For these reasons we reverse the judgment of the court of appeals and affirm that of the court of criminal correction. All concur.

THE STATE *ex rel.* HARRIS v. LAUGHLIN.

1. **Courts**: ST. LOUIS COUNTY: CONSTITUTIONAL LAW. No provision of the constitution of 1875 is violated by those sections of the act of 1877, dividing the State into judicial circuits, which detach the new county of St. Louis as formed by the scheme and charter from the Eighth judicial circuit, and attach it to the Nineteenth. The result of this change was to withdraw the county of St. Louis from the

jurisdiction of the St. Louis criminal court, and to limit the jurisdiction of that court to the territory included in the city of St. Louis. HENRY and HOUGH, JJ., dissenting.

2. **Constitutional Law**: RULES OF CONSTRUCTION. When the constitutionality of a statute is to be determined, resort should not be made to mere verbal criticisms, subtle distinctions, abstract reasoning or nice differences in the meaning of words. It will be presumed to be constitutional till the contrary plainly appears, and it is only when it manifestly infringes some provision of the constitution that it can be declared void. In cases of doubt every possible presumption not directly and clearly inconsistent with the language and subject matter is to be made in favor of the statute.

3. ——: PUBLIC ACQUIESCENCE. The act in question in this case has been assumed to be valid by two decisions of the St. Louis court of appeals, and by one decision of this court, and the act has been acquiesced in for nearly five years by the people and all departments of the government. *Held*, that these facts were sufficient to create a reasonable doubt as to the correctness of the construction which would hold it unconstitutional, and this doubt must be resolved in favor of the act.

4. **St. Louis Criminal Court.** Section 18 of the act establishing the criminal court of the city of St. Louis, (See R. S. 1879, p. 1509,) was abrogated by sections 9 and 20 of the act of 1877 dividing the State into judicial circuits.

Prohibition.

WRIT AWARDED.

Joseph R. Harris for relator.

John W. Dryden for respondent.

NORTON, J.—We are asked in this case to issue a writ of prohibition forbidding the respondent, the judge of the St. Louis criminal court from doing or permitting any act to be done under an order made by said court on the 20th day of February, 1882, directing a special venire returnable on the 14th day of March, 1882, to issue to the sheriff of the city of St. Louis, to summon 100 men from the county outside the city of St. Louis, for the trial of the cause of the State v. John D. Shea, upon an indictment for murder alleged to have been committed in the city of

St. Louis, and pending in said court. We are also asked to forbid said judge from permitting any citizens of said county of St. Louis from being sworn as jurors in said cause.

It is contended on the part of respondent that the prayer of the petitioner should be denied, because said St. Louis criminal court by virtue of the 1st, 2nd, 3rd, 15th and 18th sections of the act establishing said court, passed on the 29th day of November, 1855, obtained the jurisdiction, which it is claimed said court is about to exercise, and that it has never been deprived of the jurisdiction thus conferred. On the other hand, while it is admitted by counsel for the State that the sections of the act creating the said criminal court did confer upon it the jurisdiction claimed, it is contended that such jurisdiction was taken away from said court by an act of the general assembly passed on the 28th of April, 1877, (Acts 1877, p. 207,) dividing the State into judicial circuits. That act declares that the "State is hereby divided into judicial circuits, each circuit to consist of the counties, and to be numbered as hereinafter set forth * * Section 9. The Eighth judicial circuit shall consist of the city of St. Louis * * Section 20. The Nineteenth judicial circuit shall consist of the counties of St. Louis, St. Charles, Lincoln and Warren." It is claimed by counsel for the State that sections 24 and 25, article 9, and section 24, article 6, of the constitution of 1875, conferred upon the general assembly the power to pass the above act. Counsel for respondent deny this, and argue with great earnestness and ability, that the said act of April 28th, 1877, in so far as it undertakes to place St. Louis county in the Nineteenth judicial circuit, and make the city of St. Louis the Eighth judicial circuit, is unconstitutional and void.

1. COURTS: St. Louis county: constitutional law

No question is ever presented to a court of last resort of a more delicate and important character than one which

2 CONSTITUTIONAL LAW: rules of construction.

calls upon it to pass upon the constitutionality of an act of the legislature. In the solution of such a question when presented, resort should not be made to mere verbal criticisms, subtle distinctions, abstract reasoning or nice differences in the meaning of words: and in its consideration the maxim that "he who sticks to the letter" in the construction of a law, "sticks in the bark" is peculiarly applicable; *qui haeret in litera, haeret in cortice.* "No rule is better settled than that acts of the legislature are presumed to be constitutional till the contrary plainly appears, and it is only when they manifestly infringe upon some provision of the constitution that they can be declared to be void for that reason. In cases of doubt every possible presumption not directly and clearly inconsistent with the language and subject matter is to be made in favor of the constitutionality of the act." *State v. Able*, 65 Mo. 362; *Stephens v. St. Louis Nat. B'k*, 43 Mo. 385; *State v. Cape Girardeau, etc., R. R. Co.*, 48 Mo. 468. These observations are made as indicating the proper rule for our guidance in solving the question presented.

In support of the position taken that the said act of April 28th, 1877, is void, it is argued that by virtue of section 24, article 9 of the constitution, the Eighth judicial circuit was made to consist of the county and city of St Louis, and that it was beyond the power of the legislature to change it, as was done by said act, inasmuch as under section 24, article 6 of the constitution, said Eighth circuit was excepted from the operation of the power therein conferred upon the legislature to divide the State into judicial circuits. Said section 24, article 9, which it is claimed irrevocably (except by constitutional amendment) fixed the county and city of St. Louis into one circuit, is as follows: "The county and city of St. Louis, as now existing, shall continue to constitute the Eighth judicial circuit, and the jurisdiction of all courts of record, except the county court, shall continue until otherwise provided by law."

It is argued that the words in said section "until otherwise provided by law," relate exclusively to the subject matter of the jurisdiction of all courts of record within the Eighth circuit as therein defined, except the county court, and not to the territorial jurisdiction of such courts, and that while the general assembly might change and alter the jurisdiction of such courts as to subject matter it could not change their jurisdiction territorially. It is contended that inasmuch as said section 24 consists of two clauses, the phrase "until otherwise provided by law," according to the grammatical construction of the sentence, applies only to the next preceding clause. In support of this view we have been cited to Broom's Legal Maxims, page 679, where it is said "that relative words must ordinarily be referred to the next antecedent when the intent upon the whole deed doth not appear to the contrary and when the matter itself doth not hinder it, the last antecedent being the last word which can be made an antecedent so as to have any meaning." The same writer says in the same connection: "But, although the above general proposition is true in strict grammatical construction, yet there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent and either take from it or give it some qualification."

If the grammatical construction of said section 24 is alone to be considered in construing it, and we are not to look at the circumstances which gave origin to the section, nor to the context, nor to the end to be accomplished by it, the interpretation contended for would be at least plausible, if not correct. When, however, these things are taken into account, we think the construction contended for by respondent cannot be maintained. Said section 24, establishing, as it does, a judicial circuit, and relating, as it does, to the continuation of the jurisdiction of all courts of record therein, except the county court, we would ex-

pect to find it in article 6 of the constitution, which is devoted to the "judicial department," but instead of finding it there we find it at the close of article 9, which treats of "counties, cities and towns," and preceded by four sections devoted exclusively to the county and city of St. Louis, which said sections fully provided for and authorized the adoption of a scheme and charter, which, if adopted, would bring about a new order of things in both city and county, disintegrate the county, separate the city from the county, making each independent of the other, one to exist as a city and the other as a county. The city was to be invested with all the property in its limits hitherto belonging to the county, and was to assume all the indebtedness of the county, collect the State revenue and perform all other functions in relation to the State as if it was a county. This new order of things would leave the city of St. Louis in the possession and with the ownership of the court house and jail, and necessitate on the part of St. Louis county the location of a county seat, and the erection of necessary buildings in which to hold its courts for the administration of civil and criminal law. The evident purpose of those sections was a complete divorcement of the city and county, and to make two separate and distinct parts of what had always before been one; one of these parts to be a county, the other a city, in many respects clothed with the attributes of a county, each independent of the other. It was known by the framers of the constitution that it would go into effect, if adopted, on the 30th day of November, 1875, and that the scheme and charter authorized by said sections could be adopted, as in fact they were adopted, and went into effect in October, 1876, before any legislature elected under said constitution could be convened. It was also known that if the scheme and charter should be adopted, the territory outside of the limits of the city of St. Louis, as enlarged, would at once become a county, and that the city of St. Louis would thereafter be no part of the county, but a city, at least in name, in

the State, independent of the county, and without being in any county in the State, but still bearing the same relation to the State as a county, except it was to have no county court. To meet this novel and anomalous state of affairs, and to provide temporarily the means for the administration of civil and criminal law in this dissevered and disintegrated territory, in which, without some additional provision, neither civil nor criminal laws could have been administered, said section 24 was incorporated, and was evidently intended to apply to the condition of things that would exist after the adoption of the scheme. That such was the intention was evidenced by the fact that it continued the jurisdiction of all courts of record, except the county court, and it certainly was not intended to discontinue the jurisdiction of the county court in the city of St. Louis except in the event of the adoption of the scheme and charter. In view, therefore, of the necessity, which I have attempted to show, gave origin to said section 24, and the end sought to be accomplished by it; in view of the fact that territorial divorcement and not alliance between the city and county, was the chief object intended to be accomplished by sections 20, 21, 22 and 23 of article 9, the construction sought to be placed on said section 24, whereby the city and county would be indissolubly bound together territorially, except by constitutional amendment, in one judicial circuit, we think is not justified, especially when the construction contended for is mainly upheld by the interposition of a comma after the word "circuit," thus dividing a sentence containing two subjects into two clauses, each clause embracing a subject, with a qualifying phrase to the last clause.

If by looking at the whole instrument, especially to those parts of it which gave rise to section 24, a different intention clearly appears from that which a rigid adherence to the grammatical construction of section 24 uncertainly discloses, we are authorized to discard the latter and adopt the former according to the rule heretofore adverted to as

laid down by Mr. Broom, and as stated in Potter's Dwarris on Stat. and Con., p. 655, where he quotes from Mr. Story the following, viz: "That the first and fundamental rule in relation to the interpretation of all instruments applies to the constitution, that is, to construe them according to the sense of the terms and the intention of the parties," and he adopts Blackstone's remark that the intention of a law is to be gathered from the words, the context, the subject matter, the effects and consequences or the reason and spirit of the law, and that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of the grammar as their popular and general use; that if words are dubious their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject matter with reference to which the words are used; that the effect and consequences of a particular construction are to be examined, because if a literal meaning would involve a manifest absurdity it ought not to be adopted; and that the reason and spirit of the law, or the causes which led to its enactment are often the best exponents of the words. When the words are plain and clear and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only when there is some ambiguity or doubt arising from other sources that interpretation has its proper office. There may be obscurity as to the meaning from the doubtful character of the words used, from other clauses in the same instrument or from an incongruity or repugnancy between the words and the apparent intention derived from the whole structure of the instrument or its avowed object. In such cases interpretation becomes indispensable."

But casting out of sight all these things, and accepting the view taken by respondent that the words "until otherwise provided by law," occurring in said section 24,

relate to the word "jurisdiction" as the last antecedent, the question then to be determined is, what was meant by that term? The argument made by respondent that it means jurisdiction as to subject matter only and not as to territory, we think is unsound, and the more reasonable meaning (if it is to be limited in its meaning at all) would be to say that it referred exclusively to territorial jurisdiction, for the reason that section 22, article 6, gave the general assembly full power over the jurisdiction of all circuit courts as to subject matter, except so far as defined by the constitution itself; and section 4 of the schedule gave it full power over criminal courts, not only as to their jurisdiction, but as to their existence. Said section 22 is as follows: "The circuit court shall have jurisdiction over all criminal cases not otherwise provided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and such concurrent jurisdiction with and appellate jurisdiction from inferior tribunals and justices of the peace as is or may be provided by law." Said section 4 is as follows: "All criminal courts organized and existing under the laws of this State, and not specially provided for in this constitution, shall continue to exist until otherwise provided by law."

The general assembly having by these sections already been invested with the power to regulate the jurisdiction of these courts as to subject matter, no reason is perceived why it should again be invested by said section 24 with the same power which they already had by virtue of other sections; and the clear inference deducible from this fact is, that when power was given to regulate the jurisdiction of the courts alluded to in section 24, the jurisdiction referred to related alone to their territorial jurisdiction. If the word was not used in this sense there was no need of its use at all. But aside from this, the section itself furnishes internal evidence of the correctness of this position. It provides for the continuance of the jurisdiction of all courts of record in the city and county of St. Louis, except the

jurisdiction of the county court. Now, it is manifest that it was not the purpose to discontinue the jurisdiction of the county court throughout the city and county of St. Louis, but only to discontinue it territorially; that is, over the city of St. Louis, and if jurisdiction is to be understood in that sense as applied to the county court, it must be understood in the same sense when applied to other courts referred to in the section, as it is not to be supposed that the framers of the constitution used the same word in the same clause in one sense when applied to one court and in a different sense when applied to other courts, there being nothing either on the face of the section or in the context indicating that such was their purpose.

The view we have taken of the subject is fully sustained by the case of the *State v. Brown*, 71 Mo. 454, where this court was called upon to pass upon the constitutionality of an act of the legislature growing out of the construction of section 5 of the schedule to the constitution. That section provides: "That all courts of common pleas existing and organized in cities and towns having a population exceeding 3,500 inhabitants, and such as by the law of their creation are presided over by a judge of a circuit court, shall continue to exist and exercise their present jurisdiction, until otherwise provided by law." The Moberly common pleas was such a court as was designated by the section, and the general assembly, on the 23rd day of April, 1877, passed an act adding another township of Randolph county to the territorial limit of said court. The point raised in the case was that said court had no jurisdiction over said township because the said act of the legislature was unconstitutional. In the disposition of the point it was said: "We are unable to appreciate the force of the objection, since the constitution seems to have left to the legislature the power to enlarge or diminish the jurisdiction of these courts or to abolish them entirely. In this case the jurisdiction was enlarged so as to extend to an adjoining township, and the power to make this exten-

sion seems to have been expressly confided to the legislature." The argument made, that a construction which limits the meaning of the word to territorial jurisdiction is too narrow, applies with equal force to the construction contended for by respondent in applying it alone to subject matter.

Another and broader view may be taken, which is that the word jurisdiction, when applied to a court, without any words being used restricting or qualifying its meaning, must be understood as applying to the jurisdiction of such court both territorially and as to subject matter.

Looking at the question then from any one of the stand-points we have taken, and we think it follows that the said act of 28th of April, 1877, whereby the county of St. Louis, a part of the territory of the Eighth judicial circuit, as established by the constitution, was detached from that circuit and attached to the Nineteenth judicial circuit, was a legitimate exercise of the legislative power conferred by said section 24, article 9 of the constitution; and that the effect of the act was to withdraw the county of St. Louis from the jurisdiction of the St Louis criminal court, and limit its jurisdiction to the territory included in the city of St. Louis in like manner as the adoption of the scheme and charter withdrew the city of St. Louis from the jurisdiction of the county court of St. Louis county.

This very question was expressly decided by the St. Louis court of appeals in the case of *Ex parte Buckner*, 9 Mo. App. 540, where it was held that "when St. Louis county was attached by the legislature to the Nineteenth judicial circuit, the St. Louis criminal court was divested of jurisdiction in that county, and the circuit court of that circuit and for said county acquired exclusive criminal jurisdiction therein unaffected by the act of 1855 creating the St. Louis criminal court, and depriving the St. Louis circuit court of original criminal jurisdiction therein." The doctrine announced in the

3. ——: public acquiescence.

above case was re-affirmed by the St. Louis court of appeals in the case of the *State v. Kring*, (not yet reported,) where it said that "the jurisdiction of the St. Louis criminal court had been restricted to the city of St. Louis," and that "the territory outside the limits of the city of St. Louis had been withdrawn from the jurisdiction of the St. Louis criminal court," and what was said by that court upon this subject was expressly approved when said case came to this court. 74 Mo. 612. So it thus appears that the construction placed upon the constitutional provision in question, in the passage of said act of April 28th, 1877, by the first legislature elected and convened under it after its adoption, (which is entitled to some consideration, according to Mr. Sedgwick, page 552), has been approved and upheld by two decisions of the St. Louis court of appeals and one decision of this court, and that it has been acquiesced in for nearly five years by the people and all departments of the government. These are, at least, sufficient to create a reasonable doubt as to the correctness of the construction contended for by counsel for respondent, and this doubt, according to the authorities, must be resolved in favor of the constitutionality of the act. Sedg. on Stat. and Con., 552.

It is also argued that the exception contained in section 24, article 6, denied to the legislature the power to interfere territorially with the Eighth judicial circuit by diminishing it in taking therefrom St. Louis county. We think this is a misconception of the effect of the exception. The section is as follows: "The State, except as otherwise provided in this constitution, shall be divided into convenient circuits of contiguous counties in each of which circuits one circuit judge shall be elected; and such circuits may be changed, enlarged, diminished or abolished from time to time as public convenience may require, and whenever a circuit shall be abolished the office of judge of such circuit shall cease." The power conferred and duty enjoined on the legislature by this section was to divide the

State into judicial circuits to be composed of contiguous counties, and inasmuch as by section 24, article 9, which spoke with reference to a condition of things that would exist after the adoption of the scheme and charter, so much of the territory of the State as was embraced in the city and county of St. Louis had been constituted into a circuit composed not of contiguous counties, but of a city and county contiguous thereto, and inasmuch as said section had invested the general assembly with power to change it, such circuit was excepted from the operation of the power conferred by said section 24, article 6. Such exception could not and did not take away from the general assembly the power over the Eighth judicial circuit which section 24, article 9, invested it with.

It is urged as a reason against the construction we have given the said section 24, article 9, that it would authorize the legislature to enlarge, diminish, alter or abolish the said circuit. Grant that it would, why should it not be so? There is no peculiar sanctity or right attached to the Eighth judicial circuit, which should deny to the general assembly the same power over it which it confessedly has over every other circuit in the State created by the legislature. If safe to intrust the legislature with the power to alter, enlarge, diminish or abolish every other circuit in the State thus created, why is it unsafe to intrust it with the same power in reference to the Eighth judicial circuit, created by organic law, if the makers of such law saw fit to intrust it with the power. It is to be presumed, in either case, that the power would be wisely exercised, and with due regard to the public good.

It is also claimed that section 9 of the said act of 1877, which declares that the city of St. Louis shall constitute the Eighth judicial circuit, is void, because the legislature had no power to make any city a judicial circuit. We are unable to see the force of this position, since by said section 24, article 9, the city of St. Louis and the county of St. Louis were constituted into the Eighth judicial circuit,

and when the legislature diminished said circuit in pursuance of the power given them by the section creating it by detaching St. Louis county from it and attaching said county to the Nineteenth circuit, the city of St. Louis was left as the only territory composing said circuit, and by operation of said section 24, article 9, became the Eighth judicial circuit, and the legislature, in enacting said section 9 of the act of 1877, only affirmed what the constitution in said section 24 declared.

Our attention has been called to section 27, article 6 of the constitution, which declares that: "The circuit court of St. Louis county shall consist of five judges, and such additional number as the general assembly shall from time to time provide." It is insisted that as this section provides five judges for the circuit court of St. Louis county only, it, therefore, follows that the five judges, provided in the section, can only exercise jurisdiction in St. Louis county and not in the city unless it be held that the city and county of St. Louis still constitute the Eighth judicial circuit. The difficulty here suggested would exist, whether it be so held or not, because if the five judges are to follow the territory, St. Louis county was effectually cut off from the city of St. Louis when the scheme and charter went into operation in October, 1876, and lost its identity as a county with the city. But the difficulty, we think, is more apparent than real, and when the reason which existed and created the necessity for five circuit judges in St. Louis county and the sense in which the words "circuit court of St. Louis county" were evidently used are considered, the difficulty disappears. At the time said section 27 was inserted in the constitution St. Louis county was the Eighth judicial circuit, and the judges of said circuit were the judges of the circuit court of St. Louis county, and *vice versa*. The object of that section was to provide a sufficient number of judges to transact the legal business of said circuit composed of a county containing within its limits a city with a population, according to the census of

1870, of 310,864, about one-sixth the entire population of the State. It was the legal business which would necessarily originate in a city of such commercial importance that demanded the services of five circuit judges. It was not the legal business which would probably originate in St. Louis county (outside the limits of the city), with a population less than 40,000, according to said census, which created the necessity for that number of judges, for it would not afford sufficient civil and criminal business to employ the time of one judge, as evidenced by the fact that, in the judgment of the legislature, one circuit judge could not only transact all the civil and criminal business of St. Louis county (excluding the city of St. Louis), but that of three other counties besides, viz: Warren, Lincoln and St. Charles. The evident intention of the framers of the constitution was to provide the requisite number of judges for the Eighth judicial circuit—not for St. Louis county as simply representing a division of the State for county purposes, but for St. Louis county as representing the Eighth judicial circuit. When the reason which gave origin to the section, and the spirit which it breathes—for it is the spirit of a law which is the essence of it—are considered, we are constrained to say that the words "circuit court of St. Louis county," as they occur in that part of the section, are synonymous with the words "circuit court of the Eighth judicial circuit," and that when that circuit was limited to the city of St. Louis by the detachment of St. Louis county from it by the act of April 28th, 1877, that the five circuit judges belonged to the circuit and not to the county.

We are also of the opinion that by the said act of April 28th, 1877, the 18th section of the St. Louis criminal court act, (R. S., p. 1509,) was made wholly inapplicable to the new order of things brought about by said act, and in effect abrogated it. In the construction of section 24, article 9, we have not deemed it necessary to call to our aid section 25 of the same article

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which has been invoked as justifying our construction, notwithstanding the broad and sweeping character of the powers it confers upon the general assembly.

It follows from what has been said that respondent's demurrer to the petition must be overruled and the prayer of the petitioner granted, and it is, therefore, ordered that a writ of prohibition issue in accordance with said prayer. Judges SHERWOOD and RAY concur in this opinion; Judges HOUGH and HENRY dissent.

HENRY AND HOUGH, JJ., DISSENTING.—Prior to the passage of the act of 1877 there was no difficulty in determining, under the constitution of 1875, what was the jurisdiction of the courts in the city and county of St. Louis, either as to the subject matter or territory over which it extended. Their existence, as organized before the adoption of that constitution, was recognized by it, and provision made for their continuance. Admitting, for the sake of the argument, that the qualification, or implied grant of power to the legislature contained in the words "until otherwise provided by law," found in section 24, article 9 of the constitution, applies both to the subject matter of the jurisdiction of those courts, and the territory over which it should extend, it by no means follows that any portion of the city or county of St. Louis could be placed in any other judicial circuit. Under this construction the legislature might have provided a criminal court for the county, with jurisdiction co-extensive with the county, and a term, or terms, of the circuit court for the county, with like territorial jurisdiction, and left the Eighth judicial circuit, as formed by the constitution, intact. But while the construction of section 24, article 9, which attaches the qualifying words, "until otherwise provided by law," to the first clause of the section, providing for the continuance of the city of St. Louis and the county of St. Louis as the Eighth judicial circuit, is violative of the fundamental rules of grammar, this might be allowable, if it

were not necessary, in order to sustain such a construction, to distort numerous other sections of the constitution.

Section 24, article 6, declares that "the State, except as otherwise provided in the constitution, shall be divided into convenient circuits of contiguous counties, in each of which circuits one circuit judge shall be elected; and such circuits may be changed, enlarged, diminished or abolished, from time to time, as public convenience may require; and whenever a circuit shall be abolished the office of judge of such circuit shall cease." To what does the exception in this section relate? Palpably to the city and county of St. Louis. The constitution declares that those two portions of the territory of the State shall constitute the Eighth judicial circuit. The constitution established no other circuit, and the authority to form judicial circuits given to the general assembly applies only to the balance of the State. It is a virtual prohibition of the attachment of any portion of the city or county of St. Louis to any other judicial circuit. The authority is to form judicial circuits and to enlarge, diminish or abolish them; and, in the latter event, the office of the judge of the circuit ceased. If this power extended to the Eighth judicial circuit, then the legislature could abolish the circuit and the offices of the five judges of St. Louis county, notwithstanding section 27, article 6, provides that the circuit court of St. Louis county "shall consist of five judges."

Section 12 of article 6 declares that the jurisdiction of the court of appeals shall be co-extensive with the city of St. Louis, and the counties of St. Louis, St. Charles, Lincoln and Warren, with power to issue certain original remedial writs, and a superintending control over all inferior courts of record in said counties. By the following section it is provided that the court of appeals should consist of three judges, to be elected by the qualified voters of the city of St. Louis and the counties of St. Louis, St. Charles, Lincoln and Warren, and each of said counties is required to pay its proportional part of their salaries.

Section 14, article 6, makes these judges conservators of the peace throughout said counties. Section 27 of the same article provides that the court of appeals shall have exclusive jurisdiction of all appeals from and writs of error to the circuit courts of St. Charles, Lincoln and Warren counties, and the circuit court of St. Louis county in special term, and all courts having criminal jurisdiction in said counties. From these numerous sections it is obvious, we would say too clear for argument, if learned courts and distinguished lawyers had not held otherwise, that it was the intention of the constitutional convention that the city and county of St. Louis, however effectually divorced in other respects, should, so far as regards the administration of justice, continue to be one. Otherwise, how will one get an appeal to the court of appeals from either the city or county of St. Louis under the section just quoted? Appeals lie from the circuit court of St. Louis county, and writs of error are to issue to that court from the court of appeals, only on judgments rendered "in special term." Those words "special term" have no application to any other than the circuit court of St. Louis county, as that court was organized prior to the separation of the city from the county, and the employment of those words in the section furnishes an unanswerable argument in support of the position that the only court to which they could have any reference or application was to continue to be the circuit court of the county of St. Louis, including the city as a part of the county as one, so far as regards the administration of justice. And this view is distinctly intimated in the *State ex rel. Burden v. Walsh*, 69 Mo. 408, where it is said that the separation was to be complete, so far as the political status of the city and county respectively was concerned, but so far as the administration of justice was concerned the condition of things then existing was undisturbed. But if an appeal will lie from the county, rejecting those important words as surplusage, under what provision of the constitution conferring jurisdiction upon

the court of appeals can an appeal be taken to that court from the city of St. Louis? Where in the constitution is any warrant for a circuit court for the city of St. Louis apart from the county of St. Louis? It will not do to say that when those sections were passed upon, the members of the constitutional convention had not in contemplation the separation of the city of St. Louis from the county. Whenever, as in section 24, article 9, and section 12, article 6, the city and county of St. Louis are severally mentioned, it is evident that the proposed separation of the city and county was in the minds of the members of the convention. Why say that the jurisdiction of the court of appeals should be co-extensive with the city of St Louis and the county of St. Louis if no separation were in contemplation? The designation of the county was sufficient to embrace the city, for it was a part of the county, as much so as the city of St. Charles is a part of the county of St. Charles, or the City of Kansas of the county of Jackson.

Again, we would ask, under the construction placed upon the constitution by the majority of this court, by what authority, under the constitution, can the city of St. Louis be required to pay any portion of the salaries of the judges of the court of appeals? The counties of St. Louis, St. Charles, Lincoln and Warren are designated as the municipalities which are to pay those judges. If the view taken by our associates be correct, no constitutional or statutory provision specifically naming the county of St. Louis embraces the city of St. Louis since the separation any more than it would embrace St. Joseph, Kansas City, or any other city or town in the State.

The trouble is not with the constitution, but with the law, in support of the constitutionality of which the constitution is to be distorted, entire phrases are to be eliminated, and others inserted in their stead, qualifying words are to be transposed and made to apply to subjects to which they had no relation as placed by the framers of the constitution. The attempt is not to reconcile the act of

the general assembly with the constitution, but to reconcile the constitution with the act, and in doing so its symmetry and consistency are destroyed and chaos and confusion introduced. To support the construction contended for by relator, where the word "county" occurs in the sections bearing upon this subject, it is to be read "the city and county of St. Louis," and where the "city of St. Louis" is mentioned it is to be read "county of St. Louis," as the exigencies of this construction may require. So, in some places, one is to drop the word "county" and insert "Eighth judicial circuit," and when the Eighth judicial circuit is named, it is to be understood to mean the county of St. Louis or county and city of St. Louis, as may be necessary to sustain that construction.

The debates of the convention attending the adoption of section 25 of article 9, reserving legislative control over the city of St. Louis and county of St. Louis, make it so evident that this section was not intended to authorize the passage of such an act as that now under review that we deem it unnecessary to answer any argument based upon that section.

It is said that what is now decided by a majority of this court in this case was held in *State v. Kring*. No such question was presented by counsel in that case, either in their briefs or oral arguments. It was taken for granted that the act of 1877 was constitutional. The attention of no member of this court was directed to the question now under consideration, and it was wholly immaterial in the *Kring case* how it was decided. We will not speak of the consequences which may result from either construction. There are difficulties in the way of sustaining, as constitutional, the act of 1877, which are insurmountable. We have suggested a few of them, but a perusal of all the sections of the constitution bearing upon the subject will suggest many more, and also dangers likely to result from, and unanswerable arguments against, that construction.

If the construction placed by our brothers upon the

several provisions of the constitution which we have been considering be the correct one, then it must be confessed that the constitution of 1875 is the most ambiguous, inconsistent and imperfect instrument that ever emanated from a deliberative body so distinguished as the one that framed it. That convention was the ablest body of men ever assembled in this State in a legislative capacity, and we are of the opinion that the fault does not lie in their work, but in the interpretation placed upon it.

Entertaining these views, we feel constrained to enter our dissent from the opinion filed herein by a majority of this court.

LYNN v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Appellant.*

Railroad: ACTION FOR KILLING CATTLE: PLEADING: JUSTICE'S COURT. It is allowable in an action begun before a justice of the peace against a railroad company for killing cattle at a public crossing, to unite in one statement an allegation of failure to perform the statutory duty of ringing the bell and sounding the whistle, and an allegation of neglect in running the train; and plaintiff may recover upon proof of either or both, accompanied by evidence that the injury was due to defendant's default.

Appeal from Daviess Circuit Court.—HON. S. A. RICHARDSON, Judge.

AFFIRMED.

This was an action begun before a justice of the peace. The statement set forth that on the 10th day of October, 1877, while plaintiff was, with due care and caution, driving a drove of cattle across defendant's railroad, where a public highway crosses said railroad, the defendant then and there carelessly and negligently, by failing to ring its bell

and blow the whistle, as required by section 38, chapter 37, Wagner's Statutes, and by otherwise negligently running and conducting its train of cars over its said road, did run over, upon and against the cattle of plaintiff and injured and killed one steer, of the value of $20, etc. At the trial plaintiff offered evidence tending to show that he was in the act of driving a herd of cattle across defendant's track at a public crossing when he discovered a freight train approaching at high speed and not more than fifty to seventy-five yards away; that he tried to drive his cattle from the track, but before he could do so the train was upon him, and killed the steer and some other cattle; that the engineer and fireman saw the cattle on the track when the train was more than a quarter of a mile off, but did not slacken speed, blow the whistle, ring the bell or take any other precaution to avoid the collision. Defendant, on its part, gave evidence tending to show that plaintiff's cattle had crossed the track in safety, and when the train was within fifty yards of the crossing some of them ran back and attempted to re-cross, and were killed in the attempt; that the train could not have been stopped in time to avoid the collision; that the bell was rung and the whistle blown in proper time, and that plaintiff was guilty of negligence in failing to keep a lookout for the train, the crossing being a peculiarly dangerous one.

On the part of the plaintiff the court instructed the jury as follows: 1. If the jury believe from the evidence that the killing and crippling of plaintiff's cattle was done by defendant's locomotive and cars, on the crossing of a public traveled road, and that the whistle was not sounded at least eighty rods from said road and sounded at intervals until such train crossed said railroad; and they further believe from the evidence, and all the facts and circumstances in the case, that said killing and crippling of plaintiff's cattle resulted from the neglect to sound the whistle or ring the bell, they must find for plaintiff, unless the jury

should further find that plaintiff, by his own negligence, directly contributed to the injury.

2. If the jury believe from the evidence that by the negligence and carelessness of the defendant, or its employes in the operation of its locomotive and train over its said road, plaintiff's cattle were run over and killed, they will find for plaintiff, unless they believe from the evidence that plaintiff directly contributed, by his own negligence, to the injury done.

For the defendant the court gave the following instructions: 3. The plaintiff cannot recover in this case if the jury find from the evidence that any negligence on the part of plaintiff directly or materially contributed to the injury of his cattle.

4. Although the jury may believe that the bell was not rung or whistle sounded in time, yet the plaintiff cannot, on that account, recover unless the jury believe from a preponderance of the evidence that the cattle were struck and injured by reason of such failure to ring the bell or sound the whistle.

The court refused an instruction to the effect that on the pleadings and evidence plaintiff was not entitled to recover.

Shanklin, Low & McDougal for appellant.

Wm. D. Hamilton for respondent.

SHERWOOD, C. J.—Plaintiff's statement charges such facts as entitle him to recover under section 38, page 310, 1 Wagner's Statutes, that is, for failure by defendant to ring its bell and blow its whistle as in said section provided. The statement also alleges, in substance, that in consequence of such failure and in consequence, also, of the negligent running of the defendant's train of cars, the cattle of plaintiff were killed, etc. There was evidence tending to show that defendant failed to comply with its statutory duty as aforesaid, and was also guilty otherwise of

negligence resulting in the injury complained of. There was, therefore, no error in refusing the instruction in the nature of a demurrer to the evidence. Nor for the same reason, was error committed in embracing in the instructions given at plaintiff's request, both the grounds on which he relied for a recovery, since both those grounds constituted but one cause of action, that cause of action being the killing of plaintiff's cattle, and the statement setting forth, as the means by which that injurious result was brought about, the failure of the defendant in its statutory duty and its negligence in other particulars. And it is allowable for a plaintiff in an action before a justice of the peace to set forth his cause of action in one connected statement, as is done in the present instance. This may be done to meet the exigencies of the trial. If on the trial, he proves, for instance, that the injury complained of arose from the failure of the company to ring the bell and blow the whistle, he makes out his case. If he proves that the injury was caused by the negligence of the company in running its cars, he also succeeds; and he is entitled to the same measure of success, if he establishes that the injury was the compound result of negligence and failure in the performance of a statutory duty.

So far as concerns the instructions, those given on behalf of plaintiff, and those given on behalf of defendant, placed the cause very fairly before the jury, and left the defendant no valid ground of complaint. Therefore, judgment affirmed. All concur.

THE STATE v. PORTER, *Appellant.*

1. **False Pretenses**: OBTAINING A NOTE FROM THE MAKER. It is an offense indictable under section 1561, Revised Statutes 1879, to procure the making and delivery of a promissory note by false pretenses, and this without regard to the value of the note, or whether it is negotiable or not. A note is a "valuable thing" within the meaning of that section. An indictment would also probably lie under section 1335; but the punishment authorized by that section is only what could be inflicted for the larceny of the paper on which the note is written.
2. ——: ——: PLEADING, CRIMINAL. While an indictment under section 1561 for obtaining the signature of the maker to a promissory note by means of a trick or false pretense or false and fraudulent representation, by the express provision of that section is good without stating of what the trick consisted or what the pretense or fraudulent representation was, it must not be in the alternative or disjunctive, but must allege that the signature was obtained by one of the means specified, or if by more than one it must allege those relied upon conjunctively. It is better pleading, however, to state of what the trick consisted or what the pretense or fraudulent representation was.
3. **Practice, Criminal**: WITNESS. Under the present statute, (R. S. 1879, § 1918,) a defendant in a criminal case offering himself as a witness in his own behalf, can be cross-examined only as to matters of which he testified in chief.

Appeal from Randolph Circuit Court.—HON. G. H. BURCKHARTT, Judge.

REVERSED.

O. T. Rouse for appellant.

The indictment is defective in this, that it does not allege and negative the pretense, and does not allege that Williams believed the pretense to be true and by reason thereof signed the note. R. S. 1879, § 1335; *State v. Evers*, 49 Mo. 542; *State v. Bonnell*, 46 Mo. 395; *State v. Saunders*, 63 Mo. 482. The offense aimed at by section 1561 is the obtaining of money or "property" by false pretenses. *State v. Fancher*, 71 Mo. 460. A note is not the property

of the maker. This note was not the property of Williams, but when delivered belonged to the defendant. Before that it was not property. Hence, defendant could not be indicted for obtaining it. It was error to require defendant to testify on cross-examination as to matter not referred to in his testimony in chief. R. S. 1879, § 1918. The note is not negotiable. It had not the words "for value received." R. S. 1879, § 547.

D. H. McIntyre, Attorney General, for the State.

The indictment follows the language and is in the form given by the statute, section 1561, and is sufficient. A promissory note is a valuable thing and comes within the meaning of the statutory prohibition. *State v. Fancher*, 71 Mo. 460; *State v. Connelly*, 73 Mo. 235; *State v. Thatcher*, 35 N. J. L. 445; 2 Bish. Crim. Law, (6 Ed.) § 157. It is immaterial that the note was non-negotiable. 35 N. J. L. 445.

Henry, J.—Appellant and one Turner were jointly indicted at a special term of the Randolph circuit court held in June, 1881, and appellant was convicted and sentenced to imprisonment in the penitentiary for a term of three years, on the following indictment, omitting the caption: "T. G. Porter and N. R. Turner, late of the county of Randolph aforesaid, on the 25th day of May, 1881, at Moniteau township, in Randolph county, and State aforesaid, within the jurisdiction of said circuit court, with intent to cheat and defraud, did unlawfully and feloniously obtain from William C. Williams a certain valuable thing, to-wit: a promissory note for the sum of $750, and of the value of $750, executed by the said William C. Williams and indorsed in blank across the back by the said William C. Williams, by means and by use of certain false and fraudulent representations and statements and false pretenses, contrary to the form of the statute in such cases

made and provided, and against the peace and dignity of the State."

The evidence for the State tended to prove that defendant and Turner went to the prosecutor's house and represented themselves as agents of the Western Medical works of Indianapolis, Indiana, authorized to appoint agents to vend its medicines, and induced the prosecutor to accept an agency, and sign what the latter supposed to be a contract by which he was to receive a certain amount of medicines to sell on commission, etc., which, he afterward discovered, was a promissory note executed by, payable to, and indorsed by himself, and delivered to the defendant, for the sum of $750; that the defendant procured his signature to the note, by pretending to read what he represented to be a copy of the same, but which was a different paper, imposing no such obligation on the prosecutor.

Section 1335 of the Revised Statutes, is as follows: "Every person, who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, right in action, or other valuable thing or effects whatsoever, and every person who shall, with the intent to cheat and defraud another, agree or contract with such other person, or his agent, clerk or servant, for the purchase of any goods, wares, merchandise or other property whatsoever, to be paid for upon delivery, and shall, in pursuance of such intent to cheat and defraud, after obtaining possession of any such property, sell, transfer, secrete or dispose of the same, before paying or satisfying the owner or his agent, clerk or servant therefor, shall, upon conviction thereof, be punished in the same manner, and to the same extent as for feloniously stealing the money, property or thing so obtained."

Section 1561, reads as follows: "Every person who,

with intent to cheat and defraud, shall obtain or attempt to obtain, from any other person or persons, any money, property or valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent representation or statement or pretense, or by any other means or instrument, or device commonly called the 'confidence game,' or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction, etc.," fixing the punishment at not less than two years in the penitentiary; and provides that in every indictment under this section, "it shall be deemed and held a sufficient description of the offense to charge that the accused did on ———, unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A. B. (here insert the name of the person defrauded) his or her money or property, by means and by use of a cheat or fraud or trick or deception or false and fraudulent representation or statement or false pretense, or confidence game, or false and bogus check, or instrument, or coin, or metal, as the case may be, contrary to the form of the statutes," etc.

Under this section the indictment was found, and defendant's counsel insist that he should have been indicted, if at all, under section 1335. The evidence tended to prove that defendant had, by a trick, a false pretense, and a fraudulent representation, procured the signature and delivery by the prosecutor to the defendant, of a note, executed by, payable to, and indorsed by the prosecutor for the sum of $750.

We are inclined to the opinion that the facts would have made out a case against him under section 1335, but by a singular oversight, under a misapprehension of the law, the general assembly in that section provided a punishment for this offense, wholly inadequate to its enormity. One guilty of a violation of that section is punishable only in the same

1. FALSE PRETENSES: obtaining a note from the maker.

manner and to the same extent, as for feloniously stealing the money, property or thing so obtained. The punishment, therefore, would depend upon the amount of money, or the value of the property or thing so obtained, because the value would determine whether the punishment should be that provided for grand larceny or that inflicted for petit larceny.

At common law mere choses in action, as bonds, bills and notes, were not goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in the possession of the person from whom taken. Russ. on Crimes, 69; *People v. Loomis*, 4 Denio 382; *Wilson v. State*, 1 Port. 120. Our statutes have not changed the common law in this respect, except as to notes which have been delivered to the payee by the maker, or indorser thereof. They are, in the hands of the payee, or indorsee, subjects of larceny. It follows, that the only punishment for obtaining a promissory note from its maker, by means of a false token, or other false pretense, is that prescribed for petit larceny, no matter what amount is expressed as payable in the note. At common law, the note in the hands of the maker was not the subject of larceny, and for stealing such an instrument the offender could only be punished for stealing the paper on which it was written. "There may be larceny of paper, however slight its value, since it has some value, and if the paper is written on, still its value is not entirely destroyed." Bishop Crim. Law, § 768. "The distinction in England, therefore, is, that if a chose in action is so defective as to be void, or if a promissory note has been paid, an indictment may be maintained for stealing the price of the paper on which it is written." Ib. "This article may be worth less than the smallest sum known to the law." § 767.

For obtaining any money, property or valuable thing whatever, by means mentioned in section 1561, the punishment, on conviction, without regard to the value of the thing so obtained, is imprisonment in the penitentiary for

a term not less than two years. In the case at bar, by reading what the prisoner represented to be a copy of the instrument to be signed by the prosecutor, but which, in fact, was not a copy, or, if a copy, was purposely misread by him to the prosecutor, he induced the latter to sign an instrument of a different import from that read by the defendant, and so obtained the signature and the note by a trick, a deception, a false pretense, and a false representation, and was indictable under section 1561, without regard to the value of the paper, as a promissory note.

The case of the *People v. Loomis*, 4 Denio 382; *Wilson v. State*, 1 Port. 120; Bishop Crim. Law, and other cases and text books have been cited in support of the proposition that the note in question was not the subject of larceny, either at common law or under statutes which make it larceny to steal a written instrument, "by which any right or title to property, real or personal, shall be created, acknowledged, transferred, defeated, discharged or diminished, or which induce a right of action." Such was the statute of New York under which the *People v. Loomis* was decided, in which it was held that: "The written instrument taken by theft or robbery must not only have been made and executed in due form and manner, but must also have remained unsatisfied and in full force, so that when taken it was an effective and valuable security. The instrument, although complete in form and signature, and ready to be issued, or delivered according to its design, could not, while in that state, be the subject of robbery or larceny."

These cases, unquestionably sound in principle, are not applicable to the one at bar. Section 1561 does not declare what property shall be the subject of larceny. It does not declare the offense therein defined to be larceny. It is a statutory crime, and the section was obviously enacted in view of the law as settled by the class of cases above cited, and to provide an adequate punishment for a crime as heinous as larceny, but which was not larceny

either at common law or under our statutes. It makes it a felony for one, by any of the fraudulent means mentioned therein, to obtain from another, any money, property or valuable thing whatever. Did the defendant obtain a thing of any value when he procured the note in question? It was of no value to the prosecutor, but the statute does not declare that the thing obtained shall be of value in the hands of the person from whom it is obtained, but that if a person, by the false means mentioned, shall obtain a thing of any value, the offense is committed. Statutes like this are not to be confounded with those which declare that property and choses in action shall be subjects of larceny, which were not so at common law.

The note obtained was in form a non-negotiable promissory note, and while open to any defense the maker might have against it in the hands of any one holding it by indorsement or otherwise, was still of some value as a promissory note. Contingencies might have occurred which would have enabled the holder, even the accused, to collect the amount. If the maker had died leaving the note outstanding, it would have been impossible to prove the fraud by which it was obtained.

The indictment is in the form prescribed by the statute. That form is sufficient, but, while it may not be necessary to allege more than that the signature was procured by means of a trick, or false pretense, or false and fraudulent representation, without stating of what such trick consisted, or what the pretense or false representation was, it must not be in the alternative or disjunctive, but must allege that the property was obtained by one of the means, or, if by more than one of those specified, allege those relied upon conjunctively. In this respect this indictment is not objectionable. We think, however, that the better pleading is to state of what the trick consisted, or what the pretense, or false representation, etc., was.

2. ——: ——: pleading, criminal

The court erred in permitting the State's attorney to

cross-examine the defendant in relation to matters to which he did not testify in his examination in chief. Under the act of 1877, it was held, in the *State v. Clinton*, 67 Mo. 380; *State v. Cox*, 67 Mo. 392; *State v. Rugan*, 68 Mo. 214, and *State v. Testerman*, 68 Mo. 408, that if a defendant in a criminal cause availed himself of the privilege of testifying in his own behalf, the same latitude of cross-examination would be allowed the State as in the case of any other witness; but that act was amended at the last session of the general assembly, (see § 1918, R. S.,) and he now can be cross-examined only as to matters testified to by him in his examination in chief. We presume that this section was overlooked by the learned judge who presided at the trial of this cause. For this error, the judgment is reversed and the cause remanded. All concur.

3. PRACTICE, CRIMINAL: witness.

THE FIRST NATIONAL BANK OF SPRINGFIELD, *Appellant*, v. FRICKE.

1. **Alteration of Note.** Any alteration of a promissory note by a party thereto without the knowledge of the other parties, however immaterial, will invalidate it as against them.

   In this case, one of the makers, who was president of the Odd Fellows' Building Association, after the note had been negotiated and without the knowledge of his co-makers, affixed to his name where it appeared as maker, the abbreviations: "Pres'd't O. F. B. Ass'n," and where it appeared as payee and indorser, in each place the abbreviation "Pres'd't." *Held*, that these were material alterations and invalidated the note as against the other makers.

2. **Ratification by a Corporation** of the unauthorized act of its agent is equivalent to previous authorization. It need not be manifested by a vote or formal resolution, or be authenticated by the seal of the corporation. It will be inferred from failure promptly to disavow the act when it comes to the knowledge of the corporation.

3. **Abbreviations**: EVIDENCE. Abbreviations appearing in a written instrument may be explained by parol evidence.

Appeal from Greene Circuit Court.—Hon. W. F. Geiger, Judge.

Affirmed.

This was an action on a promissory note. The defendants, who had signed as joint makers with Job Newton, denied liability on the ground that the note had been altered without their knowledge or consent. The evidence adduced at the trial showed that the note was made for the benefit of the Odd Fellows' Building Association, and was discounted at the plaintiff bank; that on the day it became due McElhaney, the president of the plaintiff bank, told Newton, who was president of the association, that he wanted to hold the association on the note, and requested Newton to alter the note; that Newton did alter it by adding the abbreviation: "Pres'd't O. F. B. Ass'n," and "Pres'd't," as shown in the opinion of the court; that these abbreviations meant and were intended to mean "President of the Odd Fellows' Building Association;" that suit was afterward brought upon this note in the name of plaintiff against the association by Boyd, the regularly employed attorney of plaintiff, in the probate and common pleas court of Greene county, and that plaintiff had received $600 from the association in part payment of the note. Other facts appear in the opinion.

Chas. A. Winslow and *Boyd & Vaughan* for appellant.

C. W. Thrasher for respondents.

I.

Sherwood, C. J.—Action on a promissory note, which was in these words:

"$1,500 Springfield, Mo., July 8th, 1876.

Four montns after date we or either of us promise to pay to the order of J. Newton, 'Presdt.,' at the First Na-

tional Bank of Springfield, Missouri, $1,500, for value received, without defalcation or discount, with ten per cent interest per annum after due until paid.

J. NEWTON, 'Presdt. O. F. B. Ass'n.'
J. W. MCCULLAH,
D. L. GRIFFITH,
G. W. FRICKE."

Indorsed as follows:

"J. NEWTON, Presdt.'

The note as originally drawn, was:

"$1,500. SPRINGFIELD, Mo., July 8th, 1876.

Four months after date we or either of us promise to pay to the order of J. Newton, at the First National Bank of Springfield, Missouri, $1,500 for value received without defalcation or discount, with ten per cent interest per annum after due until paid.

J. NEWTON,
J. W. MCCULLAH,
D. L. GRIFFITH,
G. W. FRICKE."

Indorsed as follows:

"J. NEWTON."

The defense was *non est factum*. The evidence shows clearly that the note, long after its execution, was altered by Job Newton at the request and in the presence of McElhaney, president of plaintiff, and in the absence of and without the knowledge or consent of defendants.

This unauthorized alteration so changed the instrument that defendants were no longer bound thereby. A very stringent rule has long been maintained by this court in regard to such alterations of written instruments—a rule which conforms to the policy of the law, and very properly forbids any tampering with written instruments, by those to whom their custody is necessarily confided. In *Haskell v. Champion*, 31 Mo. 136, one B. F. C. C., a member of the firm of Champion & Co., executed a promissory

note in his own name, and procured the signature of two persons thereon, as his indorsers. Subsequently before procuring sale of the note, without their knowledge, he added to his signature the words "and Co.," thus making it B. F. C. C. & Co., and the indorsers were held discharged, although it was contended that the words "& Co." did not vary the contract, as there was no such firm as B. F. C. C. & Co., and that the added words might "be treated as a flourish, meaning nothing." In that case, however, Scott, J., in speaking for the court, said: "The law, in dealing with the subject of alteration of written instruments, looks further than to the materiality or immateriality of the alteration. Aware of the danger of countenancing the most trifling change, it has not permitted those intrusted with such instruments to alter them and afterward defend their conduct by alleging the immateriality of the alteration. There is a motive to such conduct, and if an alteration of an instrument is immaterial and believed to be so, there can be no inducement to the act. Every man's sense of justice and propriety must teach him that it is wrong to alter in any way an instrument made by another which is to bind him. As the nature and purposes of contracts require that they should pass to the hands of those who are interested in altering them to the prejudice of those who execute them, and as the facilities for making alterations are numerous and the difficulty of proving them is great, all means should be employed to impress on the minds of those who are in the possession of such paper, a sense of its inviolability." These remarks of the learned judge, considering the circumstances in which they were made; considering that it was contended that the words "& Co." were immaterial; were a "flourish meaning nothing," cannot be regarded as mere *obiter*, since they were necessary to a proper determination of the case in all its aspects.

The doctrine thus laid down has been repeatedly followed since. In *Evans v. Foreman*, 60 Mo. 449, we said:

* * "If mistakes do arise in the preparation of written instruments, aside from the consent of all parties to the needed correction, the courts of the country alone can furnish adequate redress, and we will not give sanction or countenance to the attempts of an interested party to effect by his own hand the desired reformation; as an honest blunder of this sort, if upheld in one instance, might necessitate sanctioning an alteration having that appearance but which from the infirmity of human testimony, might be grossly otherwise." In *German Bank v. Dunn*, 62 Mo. 79, we held that though the alteration was neither material nor fraudulent, yet the maker was discharged. And in the more recent case of *Moore v. Hutchinson*, 69 Mo. 429, we said: "The payee of the note had no right to alter the note in the slightest particular without the consent of all who were interested; and such unwarranted alteration rendered the note null in his hands, no matter how pure his motive in making the alteration."

And the ruling enunciated in the cases cited as to a written contract being avoided by an immaterial or the "slightest" alteration, is no new thing under the sun. This has been the rule in New Jersey since 1824, where it is held that any alteration of an instrument by the party claiming an interest under it, avoids the instrument. *Den v. Wright*, 2 Halst. 175; *Bell v. Quick*, 1 Green 312; *Hunt v. Gray*, 6 Vr. 227; *s. c.*, 10 Am. Rep. 232. In the last case, Beasley, C. J., said: "The reasons for this rule are obvious and of the most solid character. In its absence the inducement to fraud would be very strong, and public policy requires that, in the language of Lord Kenyon, 'No man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.' Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper in any degree with the written contract of another in his possession." Under these authorities, whether the alterations made in the note in suit were material or immaterial,

makes no difference in the result, if such alteration was made by a party interested in the instrument.

In this case, however, the alterations were palpably material; it changed the note in these important particulars: it made the note payable to a different payee; to the representative of an incorporated company, instead of an individual; it changed the first maker of the note from an individual to an incorporated company, and lastly, it changed the individual indorser and made his indorsement that of the president of such company. And, as seen from the foregoing authorities, the motive which prompted the alteration, whether innocent or fraudulent, cannot affect the result. See also *Miller v. Gilleland*, 19 Pa. St. 119; *Neff v. Horner*, 63 Pa. St. 327; *s. c.*, 3 Am. Rep. 555; *Fulmer v. Seitz*, 68 Pa. St. 237; *s. c.*, 8 Am. Rep. 172.

II.

But it is said that as McElhaney was not the custodian of the note and was in no way empowered by the board to act with reference to the same, what he did was the act of a stranger, and could not bind the plaintiff. This remark is doubtless true if McElhaney had no original authority to procure the alteration, or if his conduct in this regard did not meet with the subsequent sanction of the plaintiff. But this ratification occurred. The payment of the $600 on the note by the Odd Fellows' Building Association; the acceptance and receipt of the same by the bank, and the subsequent bringing, by the regular attorney of the bank, of a suit in the common pleas court on the note as altered, are not susceptible of any other construction than that the bank ratified what had been done. And the facts recited show also ratification by the Odd Fellows' Building Association of their president's act. There is no ground, therefore, for calling either the act of McElhaney or that of Newton the act of a stranger. "If a corporation ratify the unauthorized act of its agent, the ratification is equivalent to a previous authority, as in case of natural

persons." Field on Corp., § 167. And such ratification need not be manifested by any vote or formal resolution of the corporation, or be authenticated by the corporate seal; certainly not in cases like the present. Thus where the president of a railroad company established certain rates of fare and freight on a railroad, the corporation receiving and appropriating such rates was held to have ratified the president's acts and as tantamount to an original authority. Field on Corp., § 155, and cases cited. And the law of agency is as well settled with respect to corporations as to individuals, that if with knowledge of the unauthorized act of the agent the corporation neglect to promptly disavow such act, it will be as binding on the corporation as if prior authority had been conferred. Ib.; *Christian University v. Jordan*, 29 Mo. 68; *Kelsey v. Bank*, 69 Pa. St. 426; *Bredin v. Dubarry*, 14 S. & R. 30; *Gordon v. Preston*, 1 Watts 387; *Bank v. Reed*, 1 Watts & S. 101. And, certainly, no higher degree of evidence is requisite in establishing ratification on the part of a corporation, than is requisite in showing an antecedent authorization. And in regard to the latter, the doctrine is, that in order to bind the corporation in cases like the present one, no formal vote or resolution of the corporation need be shown. *Union Manufacturing Co. v. Pitkin*, 14 Conn. 174; *Washington Mutual Fire Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Preston v. Mo. & Penn. Lead Co.*, 51 Mo. 43; *Western Bank v. Gilstrap*, 45 Mo. 419, and other cases cited by defendant's counsel.

III.

And it was perfectly competent to show by parol evidence what the abbreviations placed in connection with Newton's name and signature meant, to afford an explanation of such abbreviations, and to show upon whom the liability arising from the alteration was intended to be cast. *Washington Mutual Fire Ins. Co. v. St. Mary's Seminary*, *supra*, and cases cited; Field on Corp., §§ 197, 198.

This cause was tried in conformity to these views; and for the reasons aforesaid, judgment affirmed. All concur, except HENRY, J., who concurs in the result.

STRAUS v. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILROAD COMPANY, *Appellant.*

1. **Railroad**: PASSENGER ALIGHTING FROM MOVING TRAIN: NEGLIGENCE. In an action by a passenger against a railroad company to recover for injuries sustained in alighting from a train as it was in the act of moving out from plaintiff's station;

Held, that if the train was not stopped at the station a sufficient length of time to enable plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was started while plaintiff was in the act of alighting, the company was liable. Or if insufficient time was allowed, but before plaintiff attempted to alight the train was started, and he then jumped from the train while its motion was still so slight as to be almost imperceptible and was injured, it was for the jury to determine from the age and physical condition of plaintiff and the attendant circumstances, whether his act constituted negligence. In such case the negligence of the company's servants in prematurely starting the train would support a recovery if the act of the passenger in jumping from the train should not be found by the jury to amount to concurring negligence.

Held, further, that if the train was stopped a sufficient length of time to enable plaintiff to conveniently alight, and without any fault of the company's servants, he failed to do so, and the conductor, not knowing and having no reason to suspect that plaintiff was in the act of alighting, caused the train to start while he was so alighting, then the company would not be liable.

Held, further, that it is not the duty of the conductor, in all cases, after allowing a sufficient time for passengers to get off, regard being had to their age, sex, physical condition and surroundings, to pass along the train and examine the platforms of each coach, to see whether there are any persons attempting to get off, before starting his train; but if he has reason to believe that any passenger, who has reached his destination, has not alighted, and though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started and is thereby injured, the company will

be liable; but when the conductor, after allowing sufficient time for passengers to alight, starts the train before the passenger is in the act of getting off, and after the train is in motion the passenger, who has been dilatory, jumps from the train and is injured, he cannot recover.

2. ——: CONTRIBUTORY NEGLIGENCE. Where concurring negligence of the plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless the injury is also the direct result of the omission of defendant, after becoming aware of the danger to which the plaintiff is exposed, to use proper care to avoid injuring him.

Appeal from Buchanan Circuit Court.—HON. JOS. P. GRUBB, Judge.

REVERSED.

Willard P. Hall and *Strong & Mosman* for appellants, cited *Nelson v. R. R. Co.*, 68 Mo. 596; *Rains v. K'y Co*, 71 Mo. 164; *Moody v. R. R. Co.*, 68 Mo. 470.

Woodson & Crosby for respondent.

HOUGH, J.—In this action the plaintiff claimed damages in the sum of $5,000 for injuries received by him in attempting to alight, at a way station on the defendant's road, from a train of the defendant on which he was a passenger. The petition alleges in substance, that immediately upon the stopping of said train at Pickering station, which was plaintiff's destination, the plaintiff, with all convenient haste, but in the exercise of due care, attempted to leave the train, and while in the act of stepping from the train upon the platform at the depot, and before he had sufficient time to get upon said platform, said train was negligently and recklessly started on its way by the servants in charge thereof, whereby plaintiff was thrown down between said platform and the moving train and was tightly and violently compressed between the same and thereby severely bruised and injured. The answer of the defendant denied all negligence on the part of its servants,

and averred that the injuries complained of resulted from plaintiff's own negligence.

The testimony of several witnesses for the plaintiff tended to support the allegations of the petition. The plaintiff himself testified as follows: "On the 26th day of November, 1877, I was a passenger on the defendant's train going to Pickering. Had bought a ticket from St. Joseph to Pickering. Just as the train whistled for Pickering, I got up from my seat and went to the door of the car. When it stopped I opened the door and started out, and car started just as I was in the act of getting off, with a sudden jerk, and I was thrown down between the car and the platform, and rolled around till I got to the end of the platform. I suffered a great deal for two or three weeks—I might say agony—laid on my back for six weeks. My back is injured to the present day. I was unable to do any work until after the 1st day of January, 1878. Changes in the weather affect me more or less. I feel them, and am not as strong as I used to be. My back is weak. I can't lift as I used to be able to."

Several witnesses testified that the plaintiff told them a short time after the accident, that he had been traveling on trains so much that he had become careless; that he did not notice that the train was moving, and got off backwards, and that nobody was to blame for his getting hurt but himself. Other witnesses testified that the defendant told them that the conductor was not to blame. The plaintiff, on his cross-examination, admitted that he stated to several persons that the conductor was not to blame, but said he so stated because he did not wish to get the conductor into trouble. But he denied that he ever stated to any one, that no one was to blame but himself. The conductor testified as follows: "The train stopped still. The stop was for at least one-half a minute. We stopped the usual length of time for stops at stations at which no business is to be transacted. After the train stopped I walked out on the depot platform, walked across to the cor-

ner of the depot and leaned up against the building a few seconds. * * As I went across the platform to the depot, I looked to the left over my shoulder toward the rear of the train and saw the plaintiff coming down the steps of the car. I leaned against the depot a few seconds, and then gave the signal to the engineer to go ahead, and walked across the platform to the door of the baggage car, and went in. I went into the same door I came out of; went back into the same car. The car had not started when I went into it." The station agent at Pickering testified, in substance, that after the train stopped, he walked from his office across the platform to the train, got his mail from the train, and returned to the office door before the train started. He saw the plaintiff standing on the car platform looking through the door into the car, and saw him, after the train started, step off the car with the wrong foot, which whirled him around and off his feet.

At the request of the plaintiff, the court gave the following instructions: 1. "The court instructs the jury if they believe from the evidence that the plaintiff was, at the time stated in his petition, a passenger on defendant's train with a ticket from St. Joseph to Pickering, that said train did not stop long enough at Pickering to give plaintiff reasonable time to pass from his seat in the car to the station platform, and that plaintiff, by reason of the starting of the train while he (plaintiff) was in the act of stepping from the car, was thrown down between it and the station platform, and injured, without negligence on his part, they will find for plaintiff, and assess his damages at such sum, not exceeding $5,000, as they may deem a reasonable compensation for the injuries sustained by him."

3. "That if the jury believe from the evidence that the conductor of the train saw plaintiff standing on the car platform, and knew that he wished to stop at Pickering, but without noticing or waiting to see whether he got off or not, gave a signal for starting the train, and the train was started while the plaintiff was in the act of stepping

off, by reason of which starting plaintiff was thrown down and injured, they will find for the plaintiff."

7. "That if the jury find for the plaintiff, they will, in estimating the damages, take into consideration the age and situation of plaintiff, his bodily and mental anguish resulting from the injury received, the actual expenses to which he has been subjected by reason thereof, the loss from not being able to work, and the extent to which his ability to earn a livelihood has been impaired by the injuries received."

9. "That although the plaintiff may have failed to exercise ordinary care and prudence, which failure may have contributed to the injury complained of, yet, if the agents and employes of the defendant were guilty of negligence or carelessness in starting the train, which was the direct cause of the injury, and might, by the exercise of ordinary care and prudence, have prevented the injury, the defendant is liable."

The following instructions were given at the request of the defendant: 1. "The plaintiff cannot recover unless the evidence shows a case of negligence on the part of defendant, and if the jury believe from the evidence that both parties by their negligence immediately contributed to produce the injury, the plaintiff cannot recover, and their verdict should be for defendant."

2. "The burden of proof to establish the negligence of defendant, or of its employes, is upon the plaintiff, and unless said negligence is established by a preponderance of the evidence to the satisfaction of the jury, they will find for the defendant."

3. "If the jury believe from the evidence that the negligence of plaintiff contributed directly to his injury, in whole, or in part, they will find for the defendant, although they may believe from the evidence that defendant and its employes were also guilty of negligence."

The court on its own motion gave the following: "The court instructs the jury that such statements of the plaintiff

as the jury may believe from the evidence were made to witnesses, are evidence against him of the truth of the facts as stated."

The only instructions asked by the defendant and refused by the court, which it will be necessary to notice, are the following: 5. "If the jury believe from the evidence that the train in proof at the time of the accident stopped long enough to enable plaintiff with reasonable care to get off of said train safely, then the jury will find for the defendant."

7. "If the jury believe from the evidence that the plaintiff opened the door of the car to get off at the station just as the cars stopped at the station, and that instead of getting off at once he stopped and looked back into the car, or to talk to some person and didn't attempt to get off until the cars started again, and was then thrown down and injured in so attempting to get off, they will find for defendant."

The plaintiff recovered judgment for $500, and the defendant has appealed.

1. RAILROADS: passenger alighting from moving train: negligence.

If the servants of the defendant did not halt the train at Pickering station a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the defendant is undoubtedly liable. Hutchinson Carriers, § 612. Or, if an insufficient period of time was allowed the plaintiff for safe and convenient egress from the cars, but, before he attempted to alight, the train was started, and he then jumped from the train while its motion was still so slight as to be almost imperceptible, and was injured, it was for the jury to determine from the age and physical condition of the plaintiff, and the attendant circumstances, whether such act constituted negligence. *Doss v. M., K. & T. R'y Co.*, 59 Mo. 27; *Nelson v. A. & P. R. R. Co.*, 68 Mo. 593. In such case, the negligence of the

company's servants, in prematurely starting the train, will support a recovery, if the act of the passenger, in jumping from the train, should not be found by the jury to amount to concurring negligence.

If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of defendant's servants, he failed to do so, and the conductor, not knowing, and having no reason to suspect, that plaintiff was in the act of alighting, caused the train to start while he was so alighting, then the defendant would not be liable.

We do not conceive it to be the duty of the conductor, in all cases, after allowing a sufficient time for passengers to get off, regard being had to their age, sex, physical condition and surroundings, to pass along the train and examine the platform of each coach, to see whether there are any persons attempting to get off, before starting his train; but if he has reason to believe that any passenger who has reached his destination, has not alighted, and, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, then the company will be liable. But when the conductor, after allowing a sufficient time for passengers to alight, starts the train before the passenger is in the act of getting off, and is, therefore, guilty of no negligence, and after the train is in motion, the passenger who has been dilatory, jumps from the train and is injured, he cannot recover.

Applying these rules to the case at bar, it will be seen that the third instruction given for the plaintiff improperly ignores the question whether the train was stopped a reasonable length of time to enable the plaintiff to get off.

The ninth instruction given for the plaintiff, is in conflict with the third given for the defendant, and does not conform to the views herein expressed, and to what may now be regarded as the settled law of this State—that when the concurring negligence of

2. ——: contributory negligence.

the plaintiff proximately contributes to produce the injury complained of, there can be no recovery unless such injury is also the direct result of the omission of the defendant after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him. *Nelson v. A. & P. R. R. Co.*, 68 Mo. 593.

The fifth instruction asked by the defendant, was properly refused by the court. Its phraseology is such as to exempt the defendant from liability although guilty of negligence proximately contributing to produce the injury, after becoming aware of the concurring negligence of the plaintiff.

The seventh instruction asked by the defendant was also properly refused, for the reason that it is not, as it should be, predicated upon the hypothesis that the train was stopped a reasonable length of time to enable the plaintiff to get off.

The judgment will be reversed and the cause remanded. The other judges concur.

THE INHABITANTS OF THE TOWN OF BUTLER v. ROBINSON, *Appellant*

1. **Pleading**: JEOFAILS; MUNICIPAL CORPORATION. In an action by a town to recover the cost of a sidewalk laid down by the town in front of certain lots, the statement failed to allege that the lots were within the corporate limits, and that defendant was the owner of them. *Held*, that these were fatal and incurable omissions.
2. **Municipal Charters**: JUDICIAL NOTICE. The courts do not take judicial notice of acts of municipal incorporation except where they are declared to be public statutes.

Appeal from Bates Circuit Court.—HON. F. P. WRIGHT, Judge.

REVERSED.

This was an action begun before a justice of the peace. The statement was as follows: Plaintiff states that it is a corporation duly incorporated under the laws of the State of Missouri, that as such corporation it has full power to pass ordinances regulating the construction of sidewalks within its limits, that on February 26th, 1876, it did, by its board of trustees, pass an ordinance in regard to the repairing and erecting sidewalks in said corporation, that under and by virtue of said ordinance said board of trustees, at a regular meeting held on the 3rd day of September, 1877, passed a special ordinance ordering defendant to build a sidewalk along the south side of lot number 1, in block number 2, in Williams' addition to the town of Butler; said walk to be constructed according to certain specifications in said special ordinance contained, and within thirty days from the passage thereof; that a certified copy of said special ordinance was by the marshal of said town served upon said defendant; that said defendant neglected and refused to comply with said special ordinance or to build any sidewalk whatever in front of said property; that the street commissioner of said corporation, under and by virtue of the ordinances of said corporation, proceeded to build and did build said walk, and that the cost of erecting said walk was $62.03, for which amount plaintiff prays judgment.

James K. Brugler and *Edwards & Davison* for appellant.

T. J. Smith and *Parkinson & Abernathy* for respondent.

SHERWOOD, C. J.—We are met on the threshold of this cause by two fatal defects in the proceedings instituted before the justice of the peace. The statement is defective in failing to set forth either that the lots mentioned were within the corporate limits of the town of Butler, or that the defendant was the owner of the lots. These are defects which no amount of evidence can supply. They are

not mere failures in some minor particulars, which evidence, being introduced, may remedy, but are absolute failures to state a cause of action. Neither the curative powers of our statute of jeofails, nor the common law arising after verdict and in support thereof, apply to a statement like the present one. *Weil v. Greene Co.*, 69 Mo. 281, and cases cited. But even if evidence could supply such omissions, nothing of this kind occurred at the trial. In no view of the case, then, can the judgment rendered be permitted to stand.

But aside from the foregoing matters, there is nothing in this record to show that the town of Butler had any authority to pass the ordinance whereon the plaintiffs rely to maintain their action, since the charter of the town of Butler was not introduced. Courts cannot take judicial cognizance of charters incorporating towns, as they may do of public statutes. 1 Greenleaf Ev., §§ 479, 480. It is only where an act of incorporation is declared to be a public act that courts will judicially notice it, as they will statutes of a public nature. *Bowie v. Kansas City*, 51 Mo. 454.

Judgment reversed and cause remanded. All concur.

HENRY, *Appellant*, v. BELL.

1. **Township Organization**: TAXES. In a county which had adopted the Township Organization law of 1873, after the tax-books of the current year had been delivered to the collector, the township board in one of the townships levied a special tax for township purposes, and the clerk of the county court, by order of the board and without any order of the county court, recalled the book for that township and extended the special tax upon it. *Held*, that this was without authority of law, that the tax was unlawful, and the tax-book was no protection to the collector in enforcing payment.
2. **Practice in Supreme Court**: INSTRUCTIONS. Where the facts are

undisputed and their legal effect only is in question, this court may review the decision of the lower court though no instructions were given or refused.

Appeal from Bates Circuit Court.—HON. F. P. WRIGHT, Judge.

REVERSED.

A Henry pro se.

The evidence of the county clerk shows that he levied the regular township tax in April, as was his duty under the law, and that after he received the order from the township board, June 7th, he made another and additional levy in this township which was unauthorized, and could not be legally made. See Township Organization, Acts 1873, page 118, sections 16, 17, 18, in which the clerk's powers and duties are defined; so that it appears, his duty had been performed and his authority exhausted, when, as in his evidence he says, he had done all required by these sections in the time prescribed by law. So he had no power afterward, on his own motion, or by any order of the township board, to make an additional levy. The county court, by the law in force, (Acts 1873, § 15, p. 118,) alone could fix the township tax, and this the court had done before.

E. J. Smith and *P. H. Holcomb* for respondent.

No instructions or declarations of law were asked or given in this case, and no questions of law were raised or determined by the court below, and there is nothing for this court to review. 47 Mo. 322; 43 Mo. 289; 46 Mo. 36. The only thing possibly shown by the record here, if anything at all is shown, is that there was a mere irregularity in the assessment and levy made by the township board. This would not prevent the enforcement of the tax. 47 Mo. 393; 48 Mo. 282.

RAY, J.—This is an action of replevin against Bell, to recover possession of a mare taken by him from plaintiff. Defendant's answer is a general denial, and the case made by the evidence is, that defendant was collector for Mt. Pleasant township, in Bates county, and seized the mare for township taxes, claimed against plaintiff, which he refused to pay. He paid his taxes, except a special tax levied upon the taxable property of said township, to pay $7,000 which the township had agreed to pay C. C. Bassett and Henry for services as attorneys at law in certain cases against Bates county, on bonds issued by said township to a certain railroad company. It is the special tax which the plaintiff resists.

It appears from the evidence of the county clerk, who was introduced as a witness by the defendant, that this special tax in question was not upon the original tax-books, as made out and delivered by the county clerk to the collector of Mt. Pleasant township as authorized and required by section 17 of article 15 of the session acts of 24th of March, 1873, and by virtue of which the defendant justified said taking of said mare. It also appeared by the testimony of said clerk, that in pursuance of an order of the township board of Mt. Pleasant township, he added the special tax to said tax-books for said township on the 7th day of June, 1876, sometime after they had been originally placed in the hands of said collector as his authority for collecting said taxes.

1. TOWNSHIP ORGANIZATION: taxes.

By section 15 of article 15 of the Township Organization Act, which was then in force in said county, the county court of said county, at its April term in each year, was required to examine the assessment rolls of the several townships in the county, for the purpose of equalizing the valuation in the several townships, and to correct the several lists, if necessary, and to fix a certain rate to be levied upon each $100 of taxable property for county purposes, and at the same time to enter upon its records the amount

to be collected, in each township, for township purposes. Section 16 required the clerk of the county court, upon receipt of the township assessment lists, to make a copy of them, by townships, and to lay both the copies and originals before the county court at its April meeting in each year, after which he was to cause the taxes to be extended on said copy, and cause the same to be indorsed on the original lists, the amount per cent levied on each $100 worth of property, as taxes thereon. It then provided that the original rolls should remain in his office until the month of March ensuing, when he should deliver them to the clerks of the respective townships, to be filed in their townships. Section 17 made it the duty of the clerk to make out annually, for the use of the township collectors, correct duplicate tax-bills, side by side, in a bound book, of all taxes on all property assessed in the township; and that the tax-bills should set out in alphabetical order the names of the persons owing taxes, the value of such tract or lot of land and the amount of taxes thereon, the aggregate value of the property assessed to each person, and the total amount of taxes due thereon, and that said tax-bills should show the amount of State, county, township, school, bridge or other taxes, separate; the township collector to be charged with the aggregate amount of the tax-lists, and to give duplicate receipts therefor. In the 3rd subdivision of section 1 of article 9, it is made the duty of the township board of directors "to levy all taxes for township purposes, road and bridge purposes, and all other duties provided by the act for the township board of directors to perform;" but by section 6 of the same article it is provided that: "The money necessary to defray the township charges of each township shall be levied on the taxable property in such township, in the manner provided in the act for raising revenue and other moneys for State and county purposes and expenses.'

Where, in these sections, or elsewhere, the county clerk derived his authority to extend the special tax in

question, on Mt. Pleasant township tax-books, we have not been able to discover. The county court, it seems, did its duty under section 15 at its April term, and on the 7th day of June thereafter, without any order of the court, but on the order and demand of the township board of said township, the county clerk extended in the books, recalled for that purpose, the tax in question. He had no authority to do so, and this is not the case of an irregularity in the levy of a legal tax, but a levy made by one who had not the semblance of authority to do so, and such a levy so made, affords no defense to a collector for a seizure of property under it. If the special tax, in question, had appeared upon the tax-book, as originally made out and delivered to the collector under section 17 of article 15 as aforesaid, by authority of the 15th and 16th sections of same article, it would have been a valid process and a complete defense to this action, regardless of any mere irregularities there may have been in the assessment, levy or other preliminary step prior to its issuance and delivery to him; provided there was any valid authority whatever to levy the special tax, in question—upon which we express no opinion. *St. Louis Building & Savings Association v. Lightner*, 47 Mo. 393; *State to use of Pacific R. R. Co. v. Dulle*, 48 Mo. 282. But the unauthorized alteration of the process in question, after it came to his hands, by the addition of the special tax in question, so made by the county clerk, at the direction of the township board of directors, deprived it of all semblance of authority, if any it had so far as this special tax is concerned, and to that extent it was utterly void and affords no defense to this action.

As no declarations of law were asked and given or refused, it is contended that there is nothing to review, and *Weilandy v. Lemuel*, 47 Mo. 322; *Easley v. Elliott*, 43 Mo. 289, and *Wilson v. N. M. R'y Co.*, 46 Mo. 36, are cited in support of that proposition. What the court held in those cases, was that in the absence of instructions asked and given or refused, it would not

2. PRACTICE IN SUPREME COURT: instructions.

review the evidence to determine whether the court was justified in the finding and judgment or not. Here there is no conflict of evidence. There is no evidence to weigh, and the only question is, whether upon the uncontroverted facts the plaintiff was entitled to recover. While no instructions were asked or given, the court trying the cause without the intervention of a jury, manifestly held that the tax was legally levied, in reaching its conclusion that it afforded a defense for the seizure of the mare by the defendant as township collector. *Walter v. Ford*, 74 Mo. 195. The rule on this subject is, that controverted facts, especially when the evidence is contradictory, will be considered in actions triable by jury, or by the court sitting as a jury, as correctly found by the jury or trial court. But where, as in this case, documents or records are submitted in evidence, their legal effect is a matter of law, and reviewable in this court, whether any instructions were given or not. So, too, where any objection is made to the admissibility or competency of evidence, and overruled, and exceptions saved, such errors are reviewable in this court, although no instructions were given or refused. *Waddell v. Williams*, 50 Mo. 216.

The judgment, which was for defendant, is reversed and the cause remanded for further proceedings, in conformity with this opinion. All concur.

THE HOME SAVINGS BANK, *Plaintiff in Error*, v. TRAUBE.

Bank Officer's Bond: ADDITIONAL EMPLOYMENT: SURETIES' LIABILITY. The fact that the bookkeeper of a bank performs the duties of teller also, will not relieve the sureties in his bond given for the faithful performance of his duties as bookkeeper, from liability for errors committed by him in that capacity, unless the errors were in some way connected with some improper act on his part as teller, or were superinduced by his employment as such.

Error to St. Louis Court of Appeals.

REVERSED.

Everett W. Pattison for plaintiff in error cited *Rochester B'k v. Elwood*, 21 N. Y. 88; *Thompson v. Roberts*, 17 Ir. C. L. 490; 2 Story Contracts, (5 Ed.) § 1122; *Engler v. Ins. Co.*, 46 Md. 333; *Blair v. Ins. Co.*, 10 Mo. 566; *Gaussen v. U. S.*, 97 U. S. 590; *U. S. v. McCartney*, 26 Int. Rev. Rec. 28; *Skillett v. Fletcher*, 12 Jur. (N. S.) 295; 35 L. J. C. P. 154; 36 L. J. C. P. 206; *Harrison v. Seymour*, 12 Jur. (N. S.) 924; 35 L. J. C. P. 264.

Broadhead, Slayback & Haeussler for defendant in error, cited *Miller v. Stewart*, 9 Wheat. 680; *Bonar v. McDonald*, 3 H. L. Cas. 226; *Allison v. Bank*, 6 Rand. 204; *Blair v. Ins. Co.*, 10 Mo. 560; *Nolley v. Callaway Co. Ct.*, 11 Mo. 463; *State v. Boon*, 44 Mo. 262; *State v. Sandusky*, 46 Mo. 381; *Orrick v. Vahey*, 49 Mo. 431; *City v. Sickles*, 52 Mo. 122; Story's Eq. Jur., § 324; Fell on Guar. and Sur., 191; Pitman on Prin. and Sur., 208; *Bowmaker v. Moore*, 7 Price 231; *Dedham B'k v. Chickering*, 4 Pick. 314; *White v. East Saginaw*, 43 Mich. 567; *Bank v. Burns*, 46 N. Y. 170; *Mayhew v. Boyd*, 5 Md. 102; *Rathbone v. Warren*, 10 John. 586; *Bellairs v. Ebsworth*, 3 Camp. 53; *Strange v. Lee*, 3 East 484; *Simpson v. Cooke*, 8 Moore 588; *Weston v. Barton*, 4 Taunt. 673; 1 Bing. 452; De Colyar Guar. and Sur., 360, 433; *Watts v. Shuttleworth*, 7 H. & N. 353; *Railton v. Mathews*, 10 Cl. & F. 934; *Whitcher v. Hall*, 8 Dowl. & Ry. 27; *Archer v. Hale*, 4 Bing. 468; *Eyre v. Bastrop*, 3 Madd. Ch. 122; *Smith v. U. S.*, 2 Wall. 233; *McMicken v. Webb*, 6 How. 296; *Leggett v. Humphreys*, 21 How. 76; *U. S. v. Boyd*, 15 Pet. 208; *Kellogg v. Stockton*, 29 Pa. St. 460; *Hibbs v. Rue*, 4 Barr 351; *Tull v. Serrill*, 1 W. N. C. 373; *Manufacturer's, etc., v. O. F. Hall Ass'n*, 48 Pa. St. 446; 2 Am. Lead. Cas., (5 Ed.) 390, 464; Burge on Suretyship, 214; Parsons on Bills, 574; 1 Greenleaf Ev., (10 Ed.) § 567, 564; *Franklin*

Bank v. Cooper, 36 Me. 179; *Evans v. Bremridge*, 2 K. & J. 174; *Pidcock v. Bishop*, 3 B. & C. 605; Hurlstone on Bonds, (7 Law Lib.) 58, 59; *Farrar v. U. S.*, 5 Pet. 389; *Brockett v. Brockett*, 2 How. 238; *Franklin B'k v. Steward*, 37 Me. 542.

Hough, J.—This is an action against E. Traube and R. Bircher, as sureties in a bond given to the plaintiff by one Emil G. Rodel, for the faithful performance of his duties as bookkeeper for plaintiff. Certain questions of practice were discussed in the argument of the cause, but the conclusion which we have reached on the merits of the case, renders it unnecessary to say anything in regard to them.

The following extract from the referee's report presents the facts by reason whereof the defendants claim that they are discharged from all liability as sureties for Rodel:

"I find from the evidence offered in this case, that the plaintiff appointed Rodel as its bookkeeper on the 5th day of June, 1867, and that the bond in suit was given to plaintiff July 22nd, 1867, and that plaintiff did not employ said Rodel on the recommendation of defendants, or at their request. I find that the defendants were, each of them, acquainted with the duties and services ordinarily required of and imposed upon the bookkeeper of a bank, and that during the whole period of Rodel's service with plaintiff, the defendants had no information or notice that he was employed in any capacity by plaintiff, except as its bookkeeper. I find that during the time of the alleged breaches of the bond by Rodel, the plaintiff employed and used him as teller, in which capacity he received and paid out moneys of the plaintiff. I find that the ordinary duties of the bookkeeper of a bank do not require him to handle or have charge of any money, and that the ordinary duties of a teller of a bank require him to handle all the money —in other words, that as bookkeeper, Rodel handled no money of plaintiff, while as teller he handled it all; and that as teller, he was afforded opportunities and exposed to

temptations to take and appropriate to himself the moneys of plaintiff, which were not afforded him as bookkeeper; but that his latter employment did afford him facilities for hiding his defalcations, as teller, by false entries in the books. I find, also, that the duties of a bank's teller are much more responsible, and a larger bond is required of him than in case of the bookkeeper. The losses sustained by the plaintiff by reason of the errors and misconduct of Rodel, consist of losses by his act as bookkeeper; and losses by his act as bookkeeper and teller."

The losses which the plaintiff suffered by reason of Rodel's misconduct as bookkeeper, and on account of which judgment was rendered for the plaintiff by the circuit court, resulted from his failure to enter upon the books by which plaintiff settled with its customers, divers sums of money properly paid out by him as teller and duly entered on the teller's books, whereby the bank paid said sums a second time.

The defendants contend that the plaintiff, by causing Rodel to assume the duties of teller in addition to his duties as bookkeeper, increased the risk of the sureties without their knowledge or consent, and that they are thereby discharged from all liability on his bond. The general rule in regard to the liability of sureties, is well settled and has been repeatedly announced by this court. In the *State v. Sandusky*, 46 Mo. 381, it was said: "The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further." The same rule is asserted in other cases. *Blair v. Perpetual Ins. Co.*, 10 Mo. 560; *Nolley v. Callaway Co.*, 11 Mo. 463; *State v. Boon*, 44 Mo. 262; *Orrick v. Vahey*, 49 Mo. 431; *City of St. Louis v. Sickles*, 52 Mo. 122.

But we do not think that any of the cases cited sustain the position that if Rodel had honestly and faithfully discharged all of his duties as teller, but had fraudulently

or negligently omitted to make entries in the books of the bank which it was his duty as bookkeeper to make, whereby loss resulted to the bank, the sureties would not be liable for such loss. If the sureties would be liable in such case, and we cannot see why they should not be, it is plain that the simple employment of Rodel as teller would not of itself discharge him. If the bank, by requiring new and additional duties of Rodel, or by any other action on its part, prevented the proper discharge of his duties as bookkeeper, we do not think the sureties would be bound for any dereliction or default thus occasioned. It is clear that the sureties could not be held for any defalcations of Rodel as teller, and it may be they should not be held liable for any false entries made by him in order to conceal such defalcations, as they might be regarded as having been indirectly occasioned by the action of the bank in appointing him teller. But where the omission of Rodel to perform his duty as bookkeeper is wholly disconnected from any improper act on his part as teller, and was not superinduced by his appointment as teller, we do not see why the sureties should not be held liable therefor. The losses for which the defendants were held liable resulted from omissions of this character. The general principle which we think applicable to the case at bar, is announced in *Skillett v. Fletcher*, Law Rep. vol. 2, C. P. 469, decided in 1867. It was there held that where the office held by the principal is altered by the addition of new duties, the surety is discharged, but when the principal is appointed to a new office, the surety is not thereby discharged. The judgment of the court of appeals will be reversed, and that of the circuit court affirmed. The other judges concur.

WEST, *Appellant*, v. WEST'S ADMINISTRATOR.

1. **Curator and Ward**: WRONGFUL INVESTMENT OF WARD'S FUNDS HUSBAND AND WIFE. A curatrix married, and her husband became curator in her stead, having agreed before the marriage, for a valuable consideration, to pay what she owed her wards. She had invested some of the wards' money without any order of court and had loaned some of it to him. He died and she again became curatrix. In a proceeding by her against his estate to recover these amounts;

   Held, that the investment in land being unauthorized was a *devastavit*, for which he became liable by virtue of his agreement; that without such agreement he would have been liable by operation of law; that this latter liability would have ceased with his death unless there was judgment in his lifetime, but the contract liability did not cease.

   Held, also, the estate was liable for the borrowed money if deceased failed to repay it, or if he repaid it before the marriage and the curatrix failed to account for it, or if he repaid it after becoming curator.

   Held, also, that notwithstanding her double relation to the case, plaintiff had the same right to enforce the liabilities of the estate that any other curator would have had.

2. **Deeds**: COPIES AS EVIDENCE. Copies of deeds are not generally admissible in evidence without proof of loss of the originals.

3. **Effect of Annual Settlements.** Annual settlements of administrators, curators, etc., have not, like final settlements, the force and effect of judgments, but are *prima facie* evidence only of the correctness of the account stated, and are open to collateral attack.

Appeal from Andrew Circuit Court.—HON. H. S. KELLEY, Judge.

REVERSED.

Strong & Mosman for appellant.

When West assumed and charged himself with the balance due from Mrs. Neely, he only did what the law required of him. *Allen v. McCullough*, 2 Heisk. 174; *s. c.*, 5 Am. Rep. 27; Tyler on Inf. and Cov., §§ 216, 217, 218; 2 Williams Executors, (4 Am. Ed.) pp. 1529, 1561; Schouler

Dom. Rel., 105. Nor did his liability expire with his life. 1 Parsons Contracts, (5 Ed.) 344; Tyler Inf. and Cov., § 219; *Burton v. Burton*, 5 Harr. (Del.) 441. Having assumed the curatorship, the nature of the debt was altered, and from that time it became his own debt. *Eaton v. Walsh*, 42 Mo. 272; *Ex parte Mc Williams*, 1 Scho. & Lefr. 173; *Goss v. Mather*, 2 Lans. 283; *Duffy v. Neale*, Taney 271.

Wm. Heren for respondents.

HENRY, J.—Mrs. Neely was the curator of the estate of her minor children, and, without an order of court authorizing her to do so, invested about $2,000 of their money in a tract of land, taking a deed to herself and holding the land in trust for said wards. In a settlement made by her as curator, in March, 1872, she charged herself with $7,003.94, and took credit for $1,677.69, leaving a balance against her of $5,306.22. This $7,003.94 included the amount invested in the land. Subsequently, she intermarried with Jas. West, but before said marriage, he agreed with Mrs. Neely, as she and her son testified, in consideration of a large amount of personal property owned by her, that he would pay her indebtedness to her wards. After this intermarriage, West was appointed curator of the estate of said minors, and, in his first settlement as such with the probate court, charged himself with the balance which appeared against his wife in her settlement, $5,306.25, and interest $530.62, and at the conclusion of the settlement he added the following:

"The aforesaid guardian and curator further reports that the balance remaining due said wards, there now being five remaining under age, is invested in real estate by the former guardian, and that he proposes to account for interest on the same at ten per cent per annum, and to pay each ward, when he arrives at full age, the amount then due, all of which is respectfully submitted.

JAMES WEST."

It seems that he had, before his marriage, borrowed of Mrs. Neely $1,000 of her wards' money, and there was evidence tending to prove that he had paid her all of that debt, except $100, and, that she then destroyed his note. The amount invested by Mrs. Neely in the land above mentioned was $2,100, and this is a proceeding against West's estate, by his widow, as curator, to recover of that estate, with other amounts, the money so invested, and other sums for which Mrs. Neely, as former curator, was liable.

Mrs. Neely's investment of the money of her wards in real estate, was a *devastavit*. Williams on Exrs., vol. 2, p. 1529. By his intermarriage with her, James West became liable for the debts and obligations of his wife existing at the date of the marriage. Tyler on Infancy and Cov., § 216, p. 330. This liability for a debt or obligation of hers ceased at his death, if it occurred before a judgment obtained upon it, unless he assumed it as his own debt in his lifetime. Williams on Exrs., 1561; Tyler on Infancy and Cov., 335. His common law liability is a sufficient consideration for a promise to pay the wife's debt; but here, the evidence shows that he received a large amount of personal property from his wife, under an agreement made before their marriage, that in consideration of said property, he would pay her indebtedness to her wards. His written agreement attached to his first annual settlement, shows that the charge against himself of the balance of her entire indebtedness to her wards, as ascertained by her settlement, was not the result of a mistake, but was in strict compliance with an express verbal agreement, made before their intermarriage.

1. CURATOR AND WARD: wrongful investment of ward's funds; husband and wife

With regard to the $1,000, if paid to Mrs. West before her intermarriage with West, and she has not accounted for it, his estate is liable for it under the verbal promise made to her by him to pay all she owed her wards, in consideration of the property he received from her. If he

paid it to her after he qualified as curator of the children, he is of course liable, because it was then his duty to account to the estate for his said indebtedness, and he was not authorized to pay it to her. If it has never been paid or accounted for by him, his estate is liable for the amount to his successor, for it was his duty to charge himself with that amount as curator.

His written obligation to pay to the wards the money improperly invested by Mrs. Neely in the land, and his verbal agreement to pay all that she owed her wards, we think, dispose of all the subjects of controversy in this case, and fix the liability of West's estate for whatever Mrs. West was indebted to her wards, as their former curator, and such amount, if any, as may remain unpaid of West's $1,000 note to Mrs. Neely, and also whatever he may have paid of said note to Mrs. Neely before their intermarriage, or after he became curator of said estate.

If any other person than Mrs. West had succeeded her husband, as curator, the case would be free from the embarrassment which her position, as plaintiff in the suit, is calculated to produce in its investigation; but considered, as it must be, as if she were a stranger, representing in this suit, not herself but her wards, it will at once be manifest that the defense set up by defendant is not maintainable. The circuit court entertained a different opinion on these questions, and without setting out the pleadings or declarations of law made by the court, it is sufficient to say that the theory it adopted was erroneous, and a recognition of the doctrines announced herein, on a retrial, will enable the court to avoid the errors committed at the former trial.

The court also erred in admitting as evidence copies of deeds, without proof of the loss or destruction of the originals, or other facts which the law recognizes as a foundation for the admission of such testimony.

2. DEEDS: copies as evidence.

The appellant's counsel misconceived the cases of *State*

to use of Tourville v. Roland, 23 Mo. 95; *Jones v. Brinker*, 20 Mo. 87, and *Mitchell v. Williams*, 27 Mo. 399. Whether an annual, as contradistinguished from a final, settlement of administrators, curators, etc., has the force and effect of a judgment, was not the question in those cases, but in *Picot v. Biddle*, 35 Mo. 29; *Folger v. Heidel*, 60 Mo. 284, and *Seymour v. Seymour*, 67 Mo. 303, that was the precise question passed upon, and in all of those cases it was held that an annual settlement has not the force and effect of a judgment, but is only *prima facie* evidence that such statement of the account is correct, and is open to collateral attack. The judgment is reversed and the cause remanded, to be proceeded with as herein indicated. All concur.

3. EFFECT OF ANNUAL SETTLEMENT.

THE STATE v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

Municipal Corporations: TAXES. Municipal corporations have no power to grant exemption from or commutation of taxes, and a contract which undertakes to do so is void.

Appeal from Hannibal Court of Common Pleas.—HON. JOHN T. REDD, Judge.

AFFIRMED.

This was a suit brought by the city of Hannibal in the name of the State to recover city taxes assessed against the property of defendant within the city. Defendant by its answer set up among other things a contract made on the 3rd day of December, 1868, between itself and the city. This contract recited that a controversy had arisen between defendant and the city in regard to the right of the city to tax the property of defendant, and that defendant intended,

if the city exercised such right, to remove its general office and machine shops from the city to some other point, whereby but little property of the company would be left within the city and the taxes that could be collected would be small, and that it would contribute materially to the prosperity of the city to retain the general office and machine shops, and proceeded as follows: "Now, therefore, in consideration of the premises, and the further consideration of $700, to be paid annually, as hereinafter stated, by the Hannibal & Saint Joseph Railroad Company to the city of Hannibal, the city of Hannibal hereby foregoes and relinquishes all right and claim to tax the Hannibal & Saint Joseph Railroad Company and its property of every kind and description, so long as said railroad company shall keep and maintain its general office and machine shops within the limits of said city, and said railroad company hereby agrees and promises to pay into the treasury of said city the sum of $700 for the year 1869, within thirty days after the 1st day of January, 1869, and the like sum within the like period for every year thereafter, so long as it shall keep and maintain its general office and machine shops within the limits of said city as aforesaid. It is distinctly understood by the respective parties hereto, that the payment by the Hannibal & Saint Joseph Railroad Company of said sum of $700 in each and every year, as herein stipulated, is in full compromise and satisfaction of all taxes and assessments, of whatever nature or kind and whatever purpose, with which the said city has or shall hereafter have the right to assess the Hannibal & Saint Joseph Railroad Company and its property."

The answer further stated that in pursuance of said agreement defendant had, from the time of the making of said agreement, kept and maintained its general office and machine shops within the limits of the said city of Hannibal, and had paid annually the said sum of $700 in lieu of the taxes the said city was entitled to levy against and collect from the defendant, up to the year 1876, which sum

for the year 1876 was tendered to said city, but refused by it.

There was a demurrer to so much of the answer as set up this contract and the demurrer was sustained.

Geo. W. Easley for appellant.

B. F. McPherson for respondent.

SHERWOOD, C. J.—Whether that portion of defendant's answer which pleaded the contract of December 3rd, 1868, was open to the objection taken by demurrer, depends upon the power of the city of Hannibal to make such a contract.

There is nothing to be found in the charter of the city which gives countenance to the idea that such power was possessed at that time, and we know that unless by the charter, the organic law of the city, such power be granted, it has no existence. This proposition of law is general and undisputed. If the power be not granted in express words, necessarily implied, or incident to those expressly granted, or essential and indispensable to the declared objects of the corporation, then the corporation is not the possessor of such a power. Dillon on Munic. Corp., (3 Ed.) § 89, and cases cited.

There are other objections equally insuperable to the exercise of the power relied upon in the present case. For though municipal corporations may make such contracts as their respective charters authorize, they cannot so contract as to surrender or embarrass their legislative or governmental powers, or prevent the full and complete performance of their public duties; duties which result from such powers, which are conferred upon municipal corporations for public purposes, and for the public good. Such powers being in the nature of public trusts, are incapable of alienation or surrender. Dillon on Munic. Corp., § 97, and cases cited. Among the most valuable and important of those public trusts and powers is that of taxation, with-

out the exercise of which municipal government would cease to exist. No argument would seem necessary to show that the same principle, which forbids the absolute cession by a municipal corporation of the power of taxation over any given subject matter, likewise forbids that which approximates thereto. For, if, for instance, it were allowable for a municipal corporation to abdicate its taxing power *pro tanto*, this would differ only in degree and not in kind from such abdication *in toto*. The exercise of either method of surrender of its legislative and governmental powers by a municipal corporation, would, if pushed to its natural and logical conclusion, destroy the municipal government.

Besides, the idea of taxation imports the equality of apportionment and assessment upon all property. Cooley Const. Lim., p. 2, and cases cited. It is this which distinguishes taxation from arbitrary exaction. 2 Dillon Munic. Corp., § 736. And it cannot be doubted that the exemption of the property of an individual or of a private corporation from taxation, either in whole or in part, casts an unusual and inequitable burden on the property of those who have not been thus graciously favored. In Maine, whose constitutional provisions, like our own, require equality and uniformity in levying taxes, it is held that even the legislature cannot confer a general power on a town to exempt, by vote of the people thereof, the property of a manufacturing company from taxation, and that such law was unconstitutional, Appleton, C. J., saying: "But while there are no limits on the amount of taxation for public purposes, nor on the subject matter upon which it may be imposed, the requirement that it shall be uniform and equal upon the valuations is made universal. To have uniformity of taxation, the imposition of, and the exemption from taxation, must be by one and the same authority, that of the legislature. But if it be conceded that each town has the right to tax part and exempt part of the property located therein, whatever its character, uniformity in rela-

tion to the subject matter as well as to the ratio of taxation is at an end" *Brewer Brick Co. v. Brewer*, 62 Me. 62; *s. c.*, 16 Am. Rep. 395. And in Wisconsin, where the constitution requires that "the rule of taxation shall be uniform," it is held this rule extends as well to taxation by cities, towns and counties as to that levied by the State; (*Knowlton v. Supervisors, etc.*, 9 Wis. 410; *Hale v. Kenosha*, 29 Wis. 599;) and that when the legislature prescribed a different rule whereby a discrimination was made in the rate of taxation to be imposed in towns upon the same species of property, the act was a departure from the constitution, and, therefore, void. In the case at bar, the attempt of the city of Hannibal to exempt the defendant's property from paying the full amount of tax, had not, as already seen, even an act of the legislature to uphold it.

But more than that, section 30, article 1, of constitution 1865, provides that: "All property subject to taxation ought to be taxed in proportion to its value." And section 16, article 11, of the same instrument, provides that: "No property, real or personal, shall be exempt from taxation." These sections were considered by this court in *Life Association v. Board of Assessors*, 49 Mo. 512. The word "ought" in the first one was held *mandatory*, and the effect of both sections held to preclude all legislative action looking either to an exemption from taxation or to a commutation of taxes, and this, notwithstanding the law of March 10th, 1869, (Wag. Stat., 752, § 2,) provided that certain insurance companies might pay certain fees in lieu of all fees and taxes whatsoever. A similar ruling was made in similar circumstances in Ohio. *Zanesville v. Auditor*, 5 Ohio St. 589. Now, if it be true, as heretofore asserted, that the same constitutional provisions and prohibitions apply to taxation when by towns, cities and counties as when imposed by the State, and that exemption from and commutation of taxes, both alike occupy the same footing, both being under the ban of the constitution; and if it be true, also, as heretofore decided by this

court, that a city may successfully interpose the plea of *ultra vires*, when charged with having executed a contract. *Cheeney v. Brookfield*, 60 Mo. 53, and cases cited, then it only remains to say that the judgment should be, and is, accordingly, affirmed. All concur.

BROADWELL v. THE CITY OF KANSAS, *Appellant*.

1. **Municipal Corporation**: LIABILITY FOR DAMAGES. If earth used in grading a street under a contract with the city be permitted to roll down upon the premises of an adjoining proprietor, to his damage, the city will be liable.
2. ——: ——: CONSTITUTIONAL LAW. Injury so done is a taking of private property within the meaning of the provision of the constitution which forbids the taking of private property without just compensation.
3. ——: ——: JUDGMENT. It is no defense to a suit brought by the adjoining proprietor to recover for such an injury, to show that judgment has been rendered against him on a special tax-bill issued to the contractor. His claim being for unliquidated damages could not be pleaded in answer to that suit.

Appeal from Lafayette Circuit Court.—The case was tried before WILLIAM WALKER, ESQ., sitting as Temporary Judge.

AFFIRMED.

This was an action against the City of Kansas and John Halpin to recover damages for crushing in and destroying plaintiffs' house. Halpin was a contractor with the city for the grading of the sidewalks in Fifth street, and plaintiffs owned premises abutting on that street. The grade of the street, as established by the city ordinance, was about on a level with the top of plaintiffs' house. In making the fill necessary to bring the sidewalks up to grade large quantities of earth rolled down upon plaintiffs'

premises and against the wall of their house, the result of which was to crush in the wall and throw down the house. The defense was that the work was done by authority of an ordinance and with due care, and that the earth only took its natural slope in rolling down; and further, that defendant Halpin had sued plaintiffs on a special tax-bill issued by the city for the work so done, and had recovered judgment and plaintiffs had paid the judgment.

Wash Adams and *Karnes & Ess* for appellants.

The city had power to change the grade of the street, and as the damage complained of resulted from such change it was *damnum absque injuria*. *Imler v. Springfield*, 55 Mo. 119; *Schattner v. Kansas*, 53 Mo. 162; *Hoffman v. St. Louis*, 15 Mo. 651; *Wegmann v. Jefferson*, 61 Mo. 55. The evidence showed that the grading was done in the usual way, by allowing the dirt thrown upon the street to take its usual and ordinary slope. This statutory authority to grade is necessarily an authority to grade in the usual and ordinary way. The power to change the grade *ad libitum*, necessarily qualifies and restricts the doctrine of lateral support. All lots are bought and sold with reference to this statutory authority. *Taylor v. St. Louis*, 14 Mo. 20; *Radcliff v. Brooklyn*, 4 Com. 195; *Mayor v. Omberg*, 28 Ga. 46; *City of Quincy v. Jones*, 76 Ill 231; *s. c.*, 20 Am. Rep. 243. The fact that tax-bills were issued for this identical work of grading, the plaintiffs herein sued therefor by defendant Halpin, and paid by plaintiffs was certainly pertinent testimony. These bills were issued for the very work complained of here as a trespass. They were litigated and contested between plaintiffs and defendant Halpin, and their legality established, and after this had been done, plaintiffs had paid the judgment. Certainly a judgment of a court of competent jurisdiction recovered for this very work now alleged to be a trespass, would operate to relieve the acts complained of from being a trespass; besides, it would be *res adjudicata*.

Frank Titus for respondent.

The city is liable for damages occasioned by its unlawful grading and filling of plaintiffs' property, see *Wegmann v. Jefferson City*, 61 Mo. 55; *Hannon v. St. Louis*, 62 Mo. 313; *Imler v. Springfield*, 55 Mo. 119; *Soulard v. St. Louis*, 36 Mo. 546; *Thayer v. Boston*, 19 Pick. 511; *Delmonico v. City*, 1 Sandf. (N. Y.) 222; *Nevins v. Peoria*, 41 Ill. 502; *Stone v. Fairbury, etc., R. R. Co.*, 68 Ill. 394; *s. c.*, 18 Am. Rep. 556; *Stack v. East St. Louis*, 85 Ill. 377; *s. c.*, 28 Am. Rep. 619; 5 Cent. L. J. 385; *Meares v. Commissioners, etc.*, 9 Ired. 73; *Kelley v. New York*, 4 E. D. Smith 291; *Smith v. Milwaukee*, 18 Wis. 63; *Hutson v. New York*, 9 N. Y. 163; *Inman v. Tripp*, 11 R. I. 520; *s. c.*, 23 Am. Rep. 520; *Fink v. St. Louis*, 71 Mo. 52; *Barns v. Hannibal*, 71 Mo. 440. The injuries shown in evidence constitute a "taking" within the meaning of the constitutional provision regarding a taking for public use, etc., see *Pumpelly v. Green Bay Co.*, 13 Wall. 166; Cooley's Const. Lim., (3 Ed.) 545; *Sinnickson v. Johnson*, 2 Harr. (N. J.) 129; *Lackland v. R. R. Co.*, 31 Mo. 180; *Shaffner v. St. Louis*, 31 Mo. 264; *Tonawanda R. R. Co. v. Munger*, 5 Denio 255; City Charter, Acts of Mo. 1870, p. 327; City Charter, Acts of Mo. 1872, p. 403, § 24; *Dodson v. Cincinnati*, 34 Ohio St. 276; *s. c.*, 7 Cent. L. J. 398; 2 Addison on Torts, (Wood's Ed.) p. 247; *Kemper v. Louisville*, 14 Bush 87; 2 Dill. Munic. Corp., § 460, *et seq.*; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504; *s. c.*, 12 Am. Rep. 147; *Meyers v. St. Louis*, 8 Mo. App. 266.

I.

SHERWOOD, C. J.—It may be conceded at the outset that the city would not have been answerable in this action if it were bottomed on the mere fact that consequential injuries have resulted to plaintiffs because of the grading of the street by the contractor Halpin. The authorities on this point, in this State, as well as elsewhere, are numer-

ous, and many of these cited by counsel. The approved doctrine on this subject is thus succinctly stated by a writer of recognized authority. "The courts, by numerous decisions in most of the states, have settled the law that municipal corporations, acting under authority conferred by the legislature, to make and repair, or to grade, level and improve streets, if they keep within the limits of the street and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken, trespassed upon or invaded, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute creating the liability." 2 Dillon Munic. Corp., § 990.

But in this case the action is not for consequential damages, but for a direct and positive injury. The contractor Halpin, who in this behalf, was the servant of the city, did not "keep within the limits of the street." On the contrary, he trespassed upon and invaded private property. And for this the city is clearly answerable, and to it in such circumstances the doctrine of "*respondeat superior*" applies. If the contractor, while confining himself to the area and boundaries of the street, had performed the work assigned him with reasonable care and skill, and in consequence thereof some indirect, some consequential injury had resulted therefrom, no action would lie, and plaintiffs would be without remedy. And to their case, according to the authorities, would be applicable that self-contradictory maxim of "*damnum absque injuria.*" This case, however, involves no such circumstances as will admit of invoking that maxim; the injury, as before stated, being the immediate result of the wrongful act. And we think that the liability of the city and of the contractor may well be placed on either or both of these grounds: 1st, That the injury resulted from the work not being done with reasonable

care and skill; 2nd, That such injury resulted from the commission of a tort.

What is reasonable care and skill, is, of course, largely dependent on the surroundings of each particular case, and is, therefore, a relative term. But we cannot regard that as such care and skill, which unnecessarily, not to say recklessly and wantonly, dumps on the premises of an adjoining proprietor, large quantities of earth, covering those premises many feet in depth, crushing in the walls of and destroying a dwelling house, situated some twenty feet from the street. If, upon making the fill required by the contract, it became apparent that the work could not be completed without direct injury, such as before mentioned, to an adjoining proprietor, unless a wall were built to restrain the earth within the limits of the street, then such wall should have been built, and reasonable care and skill, as applicable in this connection, required that wall's construction.

The fact that statutory authority existed for doing the work, did not carry with it a power to directly injure or destroy the property of an adjoining proprietor. If it were necessary to make a fill in order to grade a street, and the embankment were required to be raised so high that it would become necessary, as is sometimes the case, to make cross-embankments, or supports of either earth or stone in order to keep the principal embankment in place, no one would doubt that before the land of adjoining proprietors could be occupied by such cross-embankments, either the consent of such proprietors would have to be obtained, or else proper legal proceedings taken to condemn the required land. And there can be no essential difference in principle between occupying one's land with earth deposited there as the incident of making the principal embankment, and doing the same thing by making a cross-embankment. If the owner of a private lot should decide to fill it with earth, the fact that he had the legal and undoubted right thus to fill his own lot up to a certain

level, would not give him the right in so doing to dump earth on his neighbor's lot, either directly or incidentally, and we do not perceive that the city has any greater rights than would a co-terminous proprietor, in similar circumstances. In a word, the maxim "*sic utere tuo ut alienum non laedas*" should govern the actions of municipal corporations as well as those of individuals.

II.

Moreover, section 16 of article 1 of the constitution of 1865, provided that: "No private property ought to be taken or applied to public use, without just compensation." Here the city and its servant took the property of plaintiffs within the meaning of that section. The taking of property within that prohibition may be either total or absolute, or a taking *pro tanto*. "Any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking and entitles him to compensation." "So a partial destruction or diminution of value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation." Cooley Const. Lim., (4 Ed.) 680, *et seq.*; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Hooker v. New Haven & North Hampton Co.*, 14 Conn. 146; *Arimond v. Green Bay Co.*, 31 Wis. 316; *Ashley v. Port Huron*, 35 Mich. 296; *s. c.*, 24 Am. Rep. 552; *Eaton v. Railroad Co.*, 51 N. H. 504; *s. c.*, 12 Am. Rep. 147.

III.

So far as concerns the judgment rendered against plaintiffs on the tax-bills, we are unable to discover what relevancy such a judgment could have in the present action, since this action is for unliquidated damages, and could not have been pleaded in answer to that suit. *Mahan v. Rose*, 18 Mo. 121; *Pratt v. Menkens*, 18 Mo. 158; *Johnson v. Jones*, 16 Mo. 494. Halpin might very properly recover for the work which he had lawfully done in grad-

ing the street, and still both he and his employer, the city, be held liable for the unnecessary and direct injury done to plaintiffs' property, while the work was in progress. This cause was tried in conformity to the foregoing views, both in giving and in refusing instructions, and the judgment is affirmed. All concur.

Motion for Rehearing Overruled.

DAVIS, *Appellant*, v. SMITH.

1. **Married Woman's Obligation**: ITS GENERAL NATURE. It is well settled in this State that if a married woman executes a note and nothing to the contrary is expressed, the creditor may by a proceeding in equity have it satisfied out of her separate property. But it is not a lien, or, strictly speaking, a charge upon the property, nor does it bind her personally. It simply constitutes a foundation for a proceeding in equity by which her separate property, but no other, may be subjected to its payment.
2. ——: ADMINISTRATION. The obligation of a married woman, even though she had a separate property when she contracted it, cannot after her death, be proved against her estate in the ordinary way. The circuit court alone can adjudicate such a demand.
3. ——: EFFECT OF HER DEATH. While the death of a married woman does not extinguish the right of a creditor to satisfaction of an obligation incurred by her while *corert*, out of what was her separate property, neither does it give him a right to satisfaction out of any other of her property. This is subject to the debts of her general creditors, if she have any, while they, equally with the special creditors, have a right to resort to whatever was her separate property for payment of their demands.
4. **Ancestor's Pleadings, not Binding on Heirs.** Heirs made parties to a suit in place of their deceased ancestor, are not bound by an answer filed by the ancestor admitting that he executed the note sued on.

This case was decided at the April term, 1881. The reporter did not receive it in time for publication in its regular order.

Appeal from Greene Circuit Court.—Hon. W. F. Geiger, Judge.

Reversed.

C. W. Thrasher for appellant.

The note sued on was clearly a charge and lien on the separate property of the defendant Harriet Smith. *Claflin v. Van Wagoner*, 32 Mo. 252; *Whitesides v. Cannon*, 23 Mo. 457; *Segond v. Garland*, 23 Mo. 547; *Coats v. Robinson*, 10 Mo. 757; *Schafroth v. Ambs*, 46 Mo. 114; *Pemberton v. Johnson*, 46 Mo. 342; *Tucker v. Gest*, 46 Mo. 339; *Bruner v. Wheaton*, 46 Mo. 363; *Kimm v. Weippert*, 46 Mo. 532; *Miller v. Brown*, 47 Mo. 504; *King v. Mittalberger*, 50 Mo. 182; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Lincoln v. Rowe*, 51 Mo. 571; *Morrison v. Thistle*, 67 Mo. 596; *Staley v. Ivory*, 65 Mo. 74; *Meyers v. Van Wagoner*, 56 Mo. 115. Every material allegation of plaintiff's petition, not denied by the answer of defendants is, for the purposes of this action, to be taken as true. R. S., § 3545; *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279; *Bartholow v. Campbell*, 56 Mo. 117; *Marshall v. Ins. Co.*, 43 Mo. 586; *Tomlinson v. Lynch*, 32 Mo. 169; 2 Whart. on Ev., § 1112. The answer of Harriet Smith is taken as the answer of the minor defendants, who at her death succeeded to her interest in the real estate sought to be charged, and are her successors in interest in this suit. R. S., § 3667. The admissions in her answer are competent evidence in this suit. 1 Whart. on Ev., §§ 226, 1156, 1219; *Crane v. Gough*, 4 Md. 316. At the death of defendant Harriet Smith her heirs at law were her only proper and necessary successors as parties to this suit. R. S., § 3663; *Belcher v. Schaumburg*, 18 Mo. 189; *Fine v. Gray*, 19 Mo. 33; *Brewington v. Stephens*, 31 Mo. 38; *Jones v. Skipworth*, 9 Beav. 237; *Waldorph v. Bortle*, 4 How. Pr. 358; *Milligan v. Milledge*, 3 Cranch 220, 228; Edwards on Parties, pp. 122, 132; 2 Van Santv. Eq. Prac., (3 Ed.) pp.

75, 76; 1 Van Santv. Plead., pp. 180, 181; Story's Eq. Plead., (Redf. Ed.) §§ 175, 354a, 364; Wells' Sep. Prop. of Marr. Wom., § 613; *King v. Little*, 77 N. C. 138. The plaintiff in this suit seeks only to enforce his claim against the land described in the petition as the separate property of the defendant Harriet Smith. No personal judgment could in any event be rendered against her in this suit. *Weil v. Simmons*, 66 Mo. 617; *Lincoln v. Rowe*, 64 Mo. 138; *Gage v. Gates*, 62 Mo. 412; *Wernecke v. Wood*, 58 Mo. 352; *Caldwell v. Stephens*, 57 Mo. 589; Wells' Sep. Prop. of Marr. Wom., § 619. The evidence shows that she had no personal estate whatever, and, therefore, there was no need of an administrator of her estate; and if one had been appointed he could have had no interest in this suit, as it relates solely and entirely to the enforcement of a specific lien on real estate, which had descended to the heirs of the deceased defendant.

George Hubbert for respondents.

There having been no proof of the execution of the note, plaintiff was not entitled to a decree. Wag. Stat., 1050, § 5; Ib., 1046, § 46; *Brickenkamp v. Rees*, 3 Mo. App. 585; *s. c.*, 69 Mo. 427; 1 Whart. Civ. Ev., (2 Ed.) § 838. Mrs. Smith being dead, appellant must pursue the ordinary remedy of a creditor against the property and estate of a deceased debtor. Upon death, intestate, of a married woman having separate property, the realty descended, at common law, to the heir; and the personalty the husband took absolutely through the medium of administration by himself. 2 Redf. on Wills, *179. But in this State all her property is liable to creditors of the intestate, in satisfaction of debts, and the remainder goes to heirs. *Leakey v. Maupin*, 10 Mo. 368; *Gillet v. Camp*, 19 Mo. 404; *Coughlin v. Ryan*, 43 Mo. 99; *Welch v. Welch*, 63 Mo. 60. Since the death of Mrs. Smith, the property in question has no peculiarities attending it, and must be reached as any other

property she may have died seized of; for separate property accommodates itself to the changes in relations of its owners, freeing itself from trust hands with removal of coverture. *Roberts v. Moseley*, 51 Mo. 286; *Baker v. Nall*, 59 Mo. 268; *Metrop. B'k v. Taylor*, 53 Mo. 444; Hill on Tr., *419; Story Eq., §§ 1384, 1397; Williams on Exrs., *742, note k; 2 Bishop Marr. Wom., § 554. Plaintiff cannot follow the specific property on the ground that he has a lien. The execution of a contract which equity will charge upon separate property cannot be deemed an equitable mortgage or a lien of any kind, such as needs to be enforced by a decree against any particular property after the marriage relation has ceased. *Owens v. Dickenson*, 1 Craig & Phil. 48. True, during life and coverture no general, personal judgment can be rendered against a *femme covert* on account of obligations contracted during coverture, and hence the necessity for the offices of equity; but after her death all her creditors, whether their claims be founded upon obligations entered into during or before coverture, stand on the same ground, and obligations will be paid out of what had been sole and separate property, which in her life could not have been charged against it. *Gregory v. Lockyer*, 6 Madd. 90; *Anon.*, 18 Ves. 258; *Norton v. Turvill*, 2 P. Will. 144; Roper's Husb. and Wife, ch. 21, § 3, pp. 238, 245. If all creditors be on the same footing, they must pursue the same remedies to obtain satisfaction. If the note was at all the obligation of Harriet Smith, the holder was her creditor, and it, after her death, was a demand against her estate and must be collected accordingly, for "all demands against the estate of any deceased person" are provided for by statute. 1 Wag. Stat., 101, § 1; 102, §§ 3, 4, 8, 9; 105, § 29. That plaintiff is to be regarded in the light of a creditor is shown by the following authorities: Story Eq., § 1401; *Morrison v. Thistle*, 67 Mo. 601; *Gay v. Ihm*, 69 Mo. 586; *DeBaun v. Van Wagoner*, 56 Mo. 347; *Owens v. Dickenson*, *supra*; *Ozley v. Ikelheimer*, 26 Ala. 332; *Caldwell v. Sawyer*, 30 Ala. 285;

Walker v. Smith, 28 Ala. 569; *Collins v. Rudolph*, 19 Ala. 616; *Gunn v. Samuels*, 33 Ala. 201; *Cowles v. Morgan*, 34 Ala. 535; *Coats v. Robinson*, 10 Mo. 757; *Whitesides v. Cannon*, 23 Mo. 457; *Claflin v. Van Wagoner*, 32 Mo. 252; *Schafroth v. Ambs*, 46 Mo. 114; *Miller v. Brown*, 47 Mo. 504; 10 Cent. L. J. 404; Peachey Marr. Settl., 269, *et seq.*; Bishop Marr. Wom., §§ 857, 858, 864; *Taylor v. Meads*, 34 L. J. N. S. Ch. 203, 207. If, in contemplation of equity, the holder of the note is a creditor, and decedent made an obligation which constituted her a debtor, these relations are as fully cognizable in our probate courts as in any other. *Titterington v. Hooker*, 58 Mo. 598. So, it would be no objection to our position if, formerly, such cases were proper subjects of chancery jurisdiction, since the jurisdiction of probate courts would seem to be exclusive, and, at the utmost, the circuit court could go no further than to ascertain the debt and certify its judgment to the probate court for classification and payment. *Wernecke v. Kenyon*, 66 Mo. 275; *Titterington v. Hooker*, 58 Mo. 593; *Pearce v. Calhoun*, 59 Mo. 271. How, then, could appellant have any valid judgment in this case, for any purpose, without having the administrator in court?

Henry, J.—This was a suit originally against Harriet and Patrick R. Smith, her husband, and Robert, as trustee of the said Harriet, wherein it was sought to charge the separate estate of Mrs. Smith with the payment of the balance of a note executed by her, her husband and her said trustee, payable to the plaintiff. Mrs. Smith died while the suit was pending and after defendants had answered, each admitting the execution of the note, and the husband and wife alleging her coverture when the note was executed; that she received no consideration for her signature; that it was procured by fraud on the part of the plaintiff; that it was not voluntarily executed by Patrick, and that Harriet signed by compulsion of her husband, to which plaintiff was a party, and that she did not thereby

intend to charge her separate estate with payment of the note. Robert's answer admitted his execution of the note as trustee of said Harriet. In February, 1875, plaintiff filed a replication to this answer, denying all its defensive allegations. Subsequently Harriet died, and this suit was revived against her heirs at law, and Geo. Hubbert was appointed their guardian *ad litem*, and as such filed an answer denying all the allegations of the petition, to which no replication was filed. The cause was taken from the circuit court of Newton county, where it originated, to Greene county, by change of venue, where, on a trial at the October term, 1877, defendant had judgment, from which plaintiff has appealed.

On said trial plaintiff read as evidence those parts of the answer of the original defendants admitting the execution of the note, the note itself, a deed conveying the property in question to Robert as trustee for the separate use, etc., of Harriet Smith, and proved that she had no other estate, and that there had been no administration on her estate. No objection was made to the admission of any of the evidence, and the judgment must have been based upon the conclusion that the circuit court had no jurisdiction of the cause, Mrs. Smith having died while it was pending. In other words, the argument made here must have prevailed in the circuit court, that, after the death of Mrs. Smith, the plaintiff had a legal demand which he could have presented for allowance in the probate court, or that the administrator of her estate, instead of the heirs, was the proper party, even if the circuit court could retain, because it had once acquired, jurisdiction. The question is, therefore, presented, whether the plaintiff had a claim against Mrs. Smith or her property, of which the probate court had jurisdiction.

As to the precise nature of the obligation of a *femme covert* who had a separate estate when it was incurred, the

1 MARRIED WOMAN'S OBLIGATION: its general nature

authorities are not agreed, but are in inextricable confusion. It is well settled in this

State that if she execute a note, and nothing to the contrary is expressed, the creditor may, by a proceeding in equity, have it satisfied out of her separate property. *Whitesides v. Cannon*, 23 Mo. 457. But it is not a lien, or, strictly speaking, a charge upon the property, nor does it bind her personally. All that can be said of it is, that it is an anomalous obligation, neither binding her nor her estate, general or separate but only constituting a foundation for a proceeding in equity, by which her separate property may be subjected to its payment, and until a decree to that effect be rendered it is neither a lien nor a charge upon the estate. If she own, in addition to her separate property, other property in which she has no separate estate, even where a court of equity enforces payment of the obligation out of the separate estate, it will not, for any deficiency of the separate estate, allow a resort to her other property.

But the proposition urged here is, that after her death, that becomes a personal obligation which, when entered into, was no obligation at all. Except with respect to her separate property, the obligation was a nullity both at law and in equity; and at law, even the ownership by her of a separate property gave it no validity whatever. "At law, she is during her coverture generally incapable of entering into any valid contract to bind either her person or her estate. In equity, also, it is now clearly established, that she cannot, by contract, bind her person or her property generally. The only remedy allowed will be against her separate property. The reason of this distinction between her separate property and her other property is, that as to the former she is treated as a *femme sole*, having the general power of disposing of it; but as to the latter, all the legal disabilities of a *femme covert* attach upon her." Story's Eq., § 1397.

2. —— : administration.

In *Sockett v. Wray*, 4 Brown Ch. 485, the Master of the Rolls said: "It is argued that supposing her a *femme sole*, she could do the act; there the single woman can act, be-

cause she can bind herself personally; but is there any contract that this married woman could enter into, that would bind her after the termination of the coverture? If she gave a bond, could she be sued upon it after the coverture? Certainly not. A man or a single woman, as they can bind themselves personally, may bind their executors and administrators; but it is not so of a married woman." In *Aylett v. Ashton*, 1 Mylne & Craig 105, which was a suit to compel the specific performance of an agreement made by a married woman with respect to her separate estate, Lord Cottenham, Master of the Rolls, referring to *Francis v. Wigzell*, 1 Madd. 258, said: "It was there decided, and clearly in conformity with all previous decisions, that the court has no power against a *femme covert, in personam*, but that if she has separate property, the court has control over that separate property. In all cases, however, the court must proceed *in rem*, against the property. A *femme covert* is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a *femme covert* labors." If the contract of a married woman could, with respect to her separate property, be treated as a personal obligation even in equity, we see no reason why it should not be specifically enforced to the extent of that property; and that it was refused by Lord Cottenham in the case of *Aylett v. Ashton*, *supra*, conclusively shows that it was not regarded by him as a personal obligation in any sense whatever. In *Parker v. Lambert*, 31 Ala. 89, it was held that "a married woman, owning a separate estate by deed, living apart from her husband by agreement with him, could not, at common law, make any contract upon which either she or her personal representative could be sued at law." The contrary was held by this court in *King v. Mittalberger*, 50 Mo. 184, but no authority was cited in support of the doctrine there announced, and the argument is far

from satisfactory. This case was followed by the court of appeals in *Hooton v. Ransom*, 6 Mo. App. 19, and *Staley v. Howard*, 7 Mo. App. 380; but as *King v. Mittalberger* is in conflict with the general current of authority, both in the United States and in England, and with the principles upon which the separate property of a *femme covert* is charged in equity, we are constrained to recede from the doctrine therein announced, and bring this court in harmony with the better considered adjudications elsewhere.

It follows from the foregoing premises that when Mrs. Smith died, the note in suit was not a debt against her for which her personal representative could be sued, and it could not be allowed in the probate court against the general assets of her estate in course of administration. It is no demand against her general estate. It could not be allowed as such. It was not a lien upon her separate estate. The right of the plaintiff to satisfaction out of her separate property is a creation of equity, recognized nowhere else, and enforceable nowhere else.

The probate court could in no manner adjudicate the demand, not because it has not jurisdiction of equitable as well as legal demands against the estate, but by reason of the special provisions regulating the exercise of the jurisdiction conferred upon that court. All demands are to be classed in the first, second, third, fourth, fifth or sixth class, and to be paid in proportion to their amounts, and no demand of any class can be paid until all previous classes are satisfied. One holding the obligation of a *femme covert* would have no right to resort to any other property of her estate, and if his demand were placed in either of the classes, he might, if the provisions of the statute were strictly observed, get satisfaction of his demand out of the general property to the exclusion of other creditors who, as to that property, have a preference over him. Specific provisions are made for those cases in which demands are liens upon any of the property of the testator or intestate, and none of these provisions applies

3. ——: effect of her death.

to the plaintiff's claim, for he has no lien. He has no demand against the estate for which he could sue Mrs. Smith's executor or administrator, and has no remedy except that to which he has resorted.

Thus far we encounter no difficulty; but here one occurs, which should be met by an amendment of the administration law, inasmuch as in this progressive age it is not unusual for married women to execute promissory notes and incur other pecuniary obligations, and to hold property for their sole and separate use. When a *femme covert* dies, her separate property ceases to be such, and stands upon the same footing as any other she may have owned. While her death does not extinguish the right of one to satisfaction of an obligation incurred by her while a *femme covert*, out of what was her separate property, he has no right to satisfaction out of any other of her property, which is subject to the debts of her general creditors, if she have any, and she may have such, while they, equally with the special creditors, have a right to resort to whatever was her separate property for payment of their demands. If, then, the court should find for plaintiff, what judgment shall it render? If it decree the sale of this property for payment of plaintiff's demand, and it should thereby be paid, and there should be other creditors, either general or special, he would obtain a preference to which he is not entitled over either class. Nor can the court, in this cause, determine whether there are or not other creditors; for unless parties to the proceedings, if there were any they would not be bound by such adjudication. It has been ascertained in this case that Mrs. Smith was possessed of no other property; but it has not been, nor could it in this proceeding be, conclusively ascertained that she owed no other debts. The circuit court cannot bring other creditors in and take charge of the administration of the estate by allowing demands against it, and making final distribution. That jurisdiction has been confided to the probate court. *Titterington v. Hooker*, 58 Mo. 593. That there is here

probably but one creditor, and only this specific property, cannot change the principle or warrant an assumption by the circuit court of probate jurisdiction. Therefore, all that court can do, if it finds for the plaintiff, is to enter a decree charging this property with plaintiff's demand—with directions to the probate court of the proper county, where letters of administration on the estate shall have been granted, to have the demand paid out of this property, if no other creditors of the estate appear within the time allowed by the administration law. If other creditors appear and have claims allowed, then this demand of plaintiff shall be placed in the class to which it would be entitled under the administration law, if it were an ordinary demand against the estate. There being no other property, it stands upon the same footing as other unpreferred demands against the estate. This would not be proper if there were other property and general creditors of the estate. In such case the directions should be such that the preference of the general creditors in the assets, other than what was her separate property should be preserved, and any preference of the special creditor in the latter should be prevented. If the other general assets should be exhausted and leave the general creditors unpaid in whole or in part, they would have an equal right to the payment of their unpaid balances out of such other estate with the special creditor for the amount of his claim. That is, his demand and the respective balances due them would be paid in proportion to the amount then due and unpaid to said special and general creditors respectively.

4. PLEADINGS, NOT BINDING ON HEIRS

With respect to the pleadings, plaintiff, under section 5, Wagner's Statutes, page 1050, must prove all material allegations put in issue by the answer of the guardian *ad litem*. The pleading of Mrs. Smith is to be taken as that of her representative, unless the latter see proper to file amended pleadings. Here the guardian, for his ward, filed an answer denying all the allegations of the petition, and thereby put plaintiff to

proof of the same, as if there had been no answer filed by Mrs. Smith. If objection had been made, it would have been error to allow plaintiff to read portions of Mrs. Smith's answer as evidence, or to read the note without proof of its execution. Mrs. Smith's answer, without an affidavit denying the execution of the note, was not sufficient to put plaintiff to proof of its execution; but the heirs are not presumed to know whether their ancestor did or did not execute it, and, therefore, could not be required to make such an affidavit in order to impose upon the plaintiff the burden of proving its execution. Judgment reversed and cause remanded, SHERWOOD, C. J., and NORTON, J., dissenting.

THE STATE v. UNDERWOOD, *Appellant.*

1. **Practice.** A rule of court which makes a change of venue case non-triable unless the transcript is filed at least fifteen days before the term, is in conflict with section 1870, Revised Statutes 1879, and void.

2. **Criminal Law**: ABSENT WITNESSES: CONTINUANCE. The statute which enables the prosecution to force the accused to trial notwithstanding the absence of a witness, by admitting that if present the witness would testify as stated in the application of the accused for a continuance, is not a violation of the constitutional guaranty that the accused shall have compulsory process for his witnesses, but it goes to the very verge of the constitution and must not be so construed as to permit a distinction to be taken between such testimony and the testimony of witnesses present. The intention is, that the statutory testimony shall be entitled to the same weight as if the witness was present at the trial

3. ——: EVIDENCE OF OTHER OFFENSES. While it is true as a general rule that on the trial of one accused of a crime evidence of other crimes committed by him is inadmissible, yet where the testimony relates to a conversation of the accused wherein he admits the commission of the offense charged and also another crime, it is proper to give in evidence the whole conversation.

4. ——— : EVIDENCE. Upon a trial for murder, defendant claiming to have acted in self-defense, offered evidence that shortly before the homicide other persons accused of crime had been taken from the hands of officers of the law and hung by a mob, but the evidence did not implicate the deceased, and it was excluded. *Held*, no error.

5. **Deputy Constables**: APPOINTMENT. A deputy constable who holds an appointment in writing, and has been sworn, may execute process, though his appointment has not been filed in the office of the clerk of the county court as required by statute.

6. **City Marshals**: POWER TO ARREST. A city marshal has no authority to make arrests for an offense not committed in his presence without a warrant. R. S. 1879, § 4998.

7. **Deputy Constable**: POWER TO ARREST. A deputy constable may arrest without warrant if he has reasonable cause to suspect that a felony has been committed.

8. **Arrest**: HOMICIDE. The mere announcement of an intention to arrest, without the actual use of force, by a person not authorized to make arrests, will not justify the person threatened in killing him.

Appeal from Barton Circuit Court.—HON. C. G. BURTON, Judge.

REVERSED.

This was an indictment for the killing of J. D. McElwrath. The evidence showed the following state of facts: Deceased was city marshal of Greenfield, Dade county, and deputy constable of Center township in which Greenfield is situated. On the 20th day of June, 1881, deceased, with others, went into the country to arrest horse thieves. They succeeded in taking Mitchell and Butler, two men charged with stealing horses. While out they obtained information that defendant Underwood was also implicated, and McElwrath returned to Greenfield to arrest him. Meeting him in a saloon, McElwrath informed defendant of his intention. The evidence was conflicting as to what occurred at this point, that of the State tending to show that the declaration of deceased was not accompanied by any threat or hostile demonstration, and that defendant instantly drew

his pistol and fired, inflicting the wound of which McElwrath died in a few minutes; while that for the defense tended to show that deceased was the first to draw his pistol, at the same time calling out to one Long, who was acting with him, to shoot defendant. On the part of the State, a witness was permitted to testify that defendant had said that certain marks on the butt of his pistol indicated the number of men he had killed, and that one of them was for McElwrath, and the other for an Indian. On the part of defendant evidence was offered to show that as the posse having Mitchell and Butler in charge, were returning to town they were several times set upon by a mob who attempted to carry off the prisoners by force with the purpose of hanging them, but the court excluded the evidence.

The instructions referred to in the opinion, are as follows: 9. "The court instructs the jury that they are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony, and in determining such credibility and weight they should take into consideration the character of the witness, his interest, if any, in the result of the case, the probability or improbability of his statements, his opportunity for obtaining knowledge concerning the matters to which he has testified, as well as all the facts and circumstances in the case; and if the jury shall believe that any witness has knowingly sworn falsely to any material matter, they are at liberty to disregard the whole or any part of such witness' testimony.'

21. "The statement read in evidence upon defendant's application for continuance, of the facts which he expected to be able to prove by the absent witnesses, are to be taken and received by the jury as the testimony of such witnesses, and are entitled to the same weight as if such absent witnesses had been sworn and given their evidence on the trial." Other facts appear in the opinion of the court.

W. C. Robinson and *E. Butler* for appellant.

D. H. McIntyre, Attorney General, and *B. G. Thurman* for the State.

SHERWOOD, C. J.—The defendant, indicted in the county of Dade for murder in the first degree, was, on change of venue to the circuit court of the county of Barton, convicted of that offense, and now appeals to this court.

I.

There was no error in denying the defendant's motion to strike the cause from the trial docket, based upon the reason that the cause coming by change of venue from another county and the transcript being filed less than fifteen days before the first day of the term, the cause was not triable at such term. The motion had the support of rule 12 of Barton circuit court, but that rule is in direct conflict with section 1870, Revised Statutes 1879, which provides that, "upon a transcript from another court being filed in the court to which the venue has been changed, the same proceedings shall be had in the cause in such court, in the same manner, and in all respects, as if the same had originated therein;" and the statute must prevail.

II.

Nor was error committed in denying defendant's application for a continuance, the prosecuting attorney, under the provisions of the statute, section 1886, having consented that the absent witnesses would, if present, testify as stated in the defendant's application. *State v. Hatfield*, 72 Mo. 518; *State v. Miller*, 67 Mo. 607. That section provides that upon such consent being given, "the facts set out in the application or affidavit, as the facts which the party asking the continuance expects to prove by the absent witness, shall be taken as and for the testimony of

such witness, the trial shall not be postponed for that cause; but the facts thus set out shall be read on the trial, and be taken and received by the court or jury trying the cause as the testimony of the absent witness; but such facts may be contradicted by other evidence, and the general reputation of such witness may be impeached, as in the case of other witnesses who testify orally or by deposition."

This statutory provision, so far as concerns criminal cases, was designed as substitutionary for that constitutional provision which allows the accused "to have process to compel the attendance of witnesses in his behalf." Art. 2, § 22. When section 1886 was first called to our attention, we had grave doubts touching its constitutionality. Taken at its best, the section is but a sorry substitute for compulsory process, and it may well admit of serious doubt whether, as a matter of strict constitutional law, a party accused of a crime can be compelled to forego the benefits arising from having the personal presence and oral testimony of his witnesses, provided the prosecuting attorney will consent that the absent witness would if present, testify in the manner stated.

But waiving the further consideration of the constitutional point, the statute expressly says that the facts thus set out shall be read on the trial, and shall be received by the court or jury trying the cause as the testimony of the absent witnesses. There can be no other rational construction placed on this language but that it was intended to place the statement of facts set forth in the application for a continuance on precisely the same footing, to all intents and purposes, as though the absent witnesses had been personally present and testified. And it was because we took this view of the matter on former occasions that we upheld the validity of the statute.

We are thus brought to a consideration of the fifteenth instruction given at the instance of the State, as follows: "The statements read in evidence as the testimony of C.

R. Turner and Jno. Doe, whose real name is unknown, are to be taken and received by the jury as the testimony of such persons were they present; and the jury are the sole judges of their credibility, and of the weight to be given to their testimony." The court, at the request of the prosecuting attorney, had previously given instruction number nine, which is the usual one given in regard to the credibility of witnesses, and so instruction fifteen above quoted was entirely unnecessary, unless it can be safely said that it is proper to draw a distinction between the testimony of witnesses who are present and testify, and statutory testimony of the absent witnesses as set forth in an application for a continuance. We are of opinion that neither the letter nor the reason and spirit of the statute under discussion, will admit of any such distinction and still less admit of such distinction being pointedly called to the attention of the jury, as we think was done in the instruction referred to. On retiring to consider of their verdict, the jury could not fail to be impressed with the line of demarkation thus drawn between the testimony of the witnesses present and that of those absent, or what is tantamount thereto, its lawful equivalent and legal substitute. Such distinctions, violative alike of the statute and of the reasons upon which it is founded, cannot receive our sanction. We went to the extreme verge of the constitution in upholding the constitutionality of the statute, and having gone so far, we are unwilling to go still further, and by a loose construction fritter away the doubtful and substitutionary benefits that statute confers and whatever of slender protection to the rights of the accused it affords. For these reasons, we think there was error in giving instruction number fifteen on the part of the State, and in refusing instruction number twenty-one asked for defendant; as the latter, in our opinion, correctly embodies that which the legislature intended to be the effect of the statute we have discussed.

III.

In regard to the admission of evidence concerning the marks on the pistol, etc., there was no error in admitting it. True, as a general rule, that on the trial of one accused of crime, evidence of other crimes committed by him is inadmissible. *State v. Martin*, 74 Mo. 547, and cases cited. But where the testimony relates to a conversation of the accused, wherein he admits the commission of a homicide, with which he is charged, and also in the same conversation makes admissions of another crime, it is proper and competent to give in evidence the whole conversation. *State v. Carlisle*, 57 Mo. 102; Barb. Crim. Law, 463; *Rex v. Clewes*, 4 Carr. & Payne 221; 1 Greenleaf on Ev., § 218. And besides, in the case at bar, it was impossible to separate that portion of the conversation of the prisoner relating to the particular offense, from that portion of the conversation relating to another offense.

IV.

The testimony of Murphy was properly excluded. If introduced, as offered, it would only have shown an attempt to take away from the custody of the officers of the law, Mitchell and Butler, arrested for stealing horses, but would not have shown anything at all implicating McElwrath in such attempt. *State v. Estis*, 70 Mo. 438. And it was upon this express ground that the court made the ruling of which complaint is made. There was no error in it.

V.

The appointment of McElwrath as deputy constable was valid, notwithstanding the appointment had not been filed as required by law. His appointment was in writing; he had taken the oath of office, and for five or six months had been serving process, both civil and criminal, in the township where appointed. The only object the law has in requiring the appointment to be filed in the office of the clerk of the county court, (§ 652, R. S. 1879,) is to preserve

record evidence of the fact of such appointment having been made.

But the fact that McElwrath was the marshal of the city of Greenfield gave him no authority to make the arrest without warrant. This point is controlled by the statute. § 4998.

His authority, however, as deputy constable was sufficient to authorize the arrest without warrant if he had reasonable cause to suspect that a felony had been committed by the defendant. Blackstone says, when speaking of a constable: "He may, without warrant, * * in case of felony actually committed, * * upon probable suspicion, arrest the felon." 4 Com. 292. Shaw, C. J., in *Comm. v. Carey*, 12 Cush. 246, thus states the rule applicable to such cases: "If a constable or other peace officer arrest a person without warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." In that case accused, after being arrested, in the endeavor to make his escape, killed the officer, and the offense was ruled to be manslaughter only; but it was also ruled that if the offense charged in the letter written to the officer to make the arrest had set forth facts constituting a felony, the offense would have been murder. Mr. Bishop, when speaking of arrest without warrant, says: "Where it is felony and is past, * * the officer is justified though no offense has been committed; * * yet must have had reasonable cause to suspect the one apprehended." 1 Bishop Crim. Proc., § 181. Upon examination of all the facts disclosed by this record, we cannot say but that McElwrath had reasonable ground authorizing him to act as he did.

VI.

But even granting that McElwrath had no authority to make the arrest, if the testimony offered on the part of the State is to be credited, the defendant was not justifiable in shooting him, as according to that testimony McElwrath had used no force and attempted no physical restraint of the defendant had simply announced his intention to make the arrest, when the fatal shot was fired. So that, even if the official character of McElwrath was unknown to defendant, yet if the testimony offered on the part of the State as to what occurred in the saloon, is to be regarded as true, the killing of McElwrath was wholly inexcusable. Mr. Wharton lays down the rule that if the defendant slay an officer of whose official character he has no notice, this is homicide in self-defense, if the killing was apparently necessary to save the defendant's life. 1 Crim. Law, § 419. Now, if the facts were as stated by the State's witnesses, there was no apparent necessity for the homicidal act and consequently no excuse therefor.

VII.

But the testimony on the part of the defendant placed the matter in quite a different light, showing that McElwrath did more than merely announce his intention of making the arrest. According to that testimony, which, so far as instructions are concerned, is to be taken as true, McElwrath spoke to defendant in a threatening manner, and attempted to draw his pistol, crying out to Long who stood in the door with a pistol in his hand, "Shoot him, Bob!" and it was no doubt upon this theory that the court gave instruction number eleven on behalf of defendant. That instruction is undoubtedly correct in that view of the case.

VIII.

And we are inclined to the opinion that an instruction should have been given also on behalf of the defendant

in relation to his knowledge of the official character of McElwrath when attempting the arrest, (1 Wharton Crim. Law, § 419,) as that element appears to have been omitted from the instructions which were given. This cause was, in the main, well tried, and in view of the fact that it must be retried, we make no further comment, but for the error committed in giving instruction number fifteen, aforesaid, and in refusing instruction number twenty-one, asked by defendant, we reverse the judgment and remand the cause. All concur.

KLENKE v. KOELTZE, *Appellant.*

1. **Practice**: REVIVAL OF SUIT: PROPER PARTY. If an action be revived against an executor alone, without objection on his part, he will not be heard after judgment and appeal to this court, for the first time to insist that the devisees ought to have been made parties, especially when it does not appear that there are devisees other than the executor himself.
2. **Married Woman's Separate Estate**: EVIDENCE. In determining whether a deed vests a separate estate in a married woman or not, the court is not limited to a construction of the deed itself. Resort may be had to the marriage contract if there be one; and if that deprives the husband of his marital right in her property, she will be deemed to take a separate estate.
3. **Marriage Contract**. A marriage contract is binding between the parties and their legal representatives, although not acknowledged or proved and recorded.
4. **Married Woman's Debts**: RIGHTS OF HER CREDITORS. The obligation of a married woman, who has a separate estate when it is incurred, is not a lien or charge upon the property, until the creditor obtains a decree against it. After her death or that of her husband, her creditors on demands existing against her before marriage have an equal right to satisfaction of their demands out of what was her separate property with creditors who have no claim against her personally, but only demands which they may enforce against her separate property, while the latter class of creditors have no right whatever to satisfaction of their demands out of her general

property. Marriage suspends the rights of her creditors, then existing, to sue her alone and proceed against her separate or general property, but the dissolution of the marriage by the death of either husband or wife revives the right of her general creditors against her and her property. *Davis v. Smith, ante*, p. 219.

Appeal from Osage Circuit Court.—Hon. A. J. Seay, Judge.

Reversed.

Smith & Krauthoff for appellant.

Belch & Silver for respondent.

Henry, J.—This suit was originally commenced by C. G. Holtschneider in the circuit court of Osage county, to charge certain real estate alleged to be the sole and separate property of Emilie, wife of August Koeltze, with the payment of a promissory note executed by her and her husband, in March, 1868. The execution of the note was admitted, but in her answer she denied that she had any sole or separate estate in any of the real property described, and alleged that she executed the note as the surety of her husband, while under coverture. August pleaded his discharge in bankruptcy, and no further steps were taken against him. Holtschneider and said Emilie both died during the pendency of the suit, and it was revived in the name of his administrator, against the executor of her last will and testament. It was proven that the note was given for property purchased by August Koeltze, and admitted that the property sought to be charged was, after her marriage, conveyed to Emilie by a general warranty deed in ordinary form, without any words therein creating a separate estate.

Plaintiff then introduced as evidence, against defendant's objection, the following instrument of writing: "This indenture of two parts made this 22nd day of October, A. D. 1857, by and between August Koeltze, of the first part, and Emilie Von Beck, of the second part, both parties

being residents of Cole county, and State of Missouri, witnesseth: That, whereas, a marriage is intended to be solemnized between the said parties of the first part and parties of the second part. That the parties of the second part doth reserve and have it distinctly understood that the amount of $3,000, now before solemnization, or after, being or coming into the hands of said parties of the second part, and of any personal or real estate, shall be reserved, kept and used to any purpose by the parties of the second part, now before, or after, solemnization, and that the parties of the second part shall have the full power to take the whole, or a part of said amount at any time and dispose of, without any interference of the parties of the first part, or his assigns, heirs or administrators; and for a more and particular understanding, the parties of the second part shall, without any trouble whatsoever, molestation, private or lawful, for the parties of the first part, his heirs, assigns or administrators, be the only owners of the amount aforesaid specified, and shall have full power, control in all respects, to dispose, give away or otherwise act with said amount according to the pleasure of the parties of the second part.

In witness whereof, we have set our hands and seals this, the 22nd day of October, A. D. 1857.

A. KOELTZE, [Seal.]
EMILIE VON BECK, [Seal.]

Signed and sealed in presence of:

HERMAN FEHRMAN.
J. C. JUSTUS CRUMBIGGI.
Filed January 21st, 1858.

G. A. PARSONS, Clerk."

It was admitted that Henry Klenke was administrator of Holtschneider's estate, and that August Koeltze was executor of the last will of Emilie Koeltze. This was all the evidence, and the court thereupon found for plaintiff, and rendered judgment that plaintiff have and recover of

the said executor of the last will of Emilie Koeltze $376.56, with interest, etc., and that the same be a charge upon said land, and that the clerk of the court certify a copy of the judgment to the county court of Osage county, having probate jurisdiction, for allowance and classification against the estate of said Emilie Koeltze, deceased.

It is contended by appellant's counsel that the judgment is erroneous, because, after the death of Mrs. Koeltze, the suit was not revived against any one but the executor of her will, and that the devisees to whom her lands were devised, should have been parties. The statute requires a suit, to which one of the parties dies, to be revived in favor of, or against, the representative of such party. Proper steps were taken under the statute to revive this suit against the legal representative of Mrs. Koeltze, and no objection, or suggestion, was made by the attorneys representing her, and after her death, her estate, that the executor was not such representative. The court determined that he was such representative. The land might have descended to heirs, or been devised, either to the executor or other persons, and if the executor was not the legal representative, a suggestion to that effect should have been made when steps were taken to revive the suit. It does not appear that the executor is not the devisee, and after standing by, and virtually conceding, throughout the trial, that he was the testator's representative as to these lands, it is now too late to raise the objection. Legal representatives are persons claiming title from a former owner of lands, whether by purchase or descent. *Bryan v. Wear and Hickman*, 4 Mo. 111; *In re Guenzler*, 70 Mo. 40.

1. PRACTICE: revival of suit: proper party.

The principal question in this case is, whether Mrs. Koeltze had a separate property in these lands. Certainly, looking alone to the deed conveying them to her, she had no separate property, and the appellant's counsel contend that we are restricted, in determining whether she had a separate property in the lands,

2. MARRIED WOMAN'S SEPARATE ESTATE: evidence.

to a consideration of that deed alone, and in support of that view rely upon the cases of *Paul v Leavitt*, 53 Mo. 598, and *Schafroth v. Ambs*, 46 Mo. 580. In *Paul v. Leavitt*, the evidence relied upon to establish a separate property of the wife in the land in controversy in that case, conveyed to her by deeds in the ordinary form without any words creating a separate estate, was, that the money of the wife was paid for the lands, and that the deeds were taken in her name in consequence thereof, and that her husband had acted as her agent in buying and selling lands, and that when he sold her lands he used the same money in buying others, and that the title was always taken in her name. In passing upon the question, the court, Wagner, J., observed: "The property was conveyed to her by deeds of general warranty, in the usual and ordinary form. They vested in her a title in fee, and that was all. The husband clearly had a marital interest in the property, and, therefore, there could be no separate estate." The court also observed that: "The instrument conveying the property must indicate such an intent;" but this observation must be construed with reference to the case under consideration, in which no attempt was made to show a separate estate in the wife, but as above stated, and the reason the court gave why she had no separate estate was, that "her husband had a marital interest in the property." In *Schafroth v. Ambs*, the deed conveying the property to the wife did not give her a separate estate, but it was contended that her husband lost his marital rights in the property by virtue of her alleged use and treatment of it after the marriage, with his consent, as her separate property. In other words, the attempt was, by parol evidence, to convert that into a separate estate, which the deed had conveyed to her generally. Neither of those cases sustains the proposition, and the argument of the court in *Paul v. Leavitt* is against it.

Here, by a marriage contract under seal, entered into by Koeltze and Mrs. Von Beck, in contemplation of their

intermarriage, it was expressly agreed that the sum of $3,000, then or after her marriage coming into her hands, and any personal or real estate she then owned or might afterward acquire, she should have the right and power to dispose of, or give away, according to her pleasure, without any interference of her husband. We have not quoted the precise language of the instrument, but stated its clear and manifest import. Had her husband any marital right in the property? Could he, or any creditor of his, in the face of that agreement have successfully asserted a marital right of the husband in the property? If not, how can it be contended that she had not a separate estate in the property? If her husband had no marital right in the property it was because the ante-nuptial agreement prevented it from attaching, because it vested in her a separate property in any land she then owned, or might subsequently acquire. This ante-nuptial agreement and the deed are to be read together, and the former is as much a part of the latter as a power of attorney is of the deed executed under it. The deed of an attorney in fact without the power of attorney conveys no title, and a resort to the ante-nuptial agreement may be had to ascertain how a married woman holds property acquired in pursuance of its stipulations.

Passing to the next question, "that the finding that said contract was duly recorded, was not sustained by the evidence," and another objection, which may be considered in connection with it, that it was not acknowledged or proved by either of the subscribing witnesses, as required by sections 3280, 3281, 3282—the objection made to the introduction of the agreement as evidence was general and not specific. This might dispose of this branch of the case, but conceding all that appellant claims, how does it help his case? Section 3282 expressly provides in the last clause, that such contract shall be valid between the parties thereto and such as have actual notice thereof, whether recorded or not. The executor,

3. MARRIAGE CONTRACT.

defendant and representative of Mrs. Koeltze, was a party to that contract, and had actual notice of its existence, and whether acknowledged or proved, or recorded, the contract is binding between the parties. *Logan v. Philips*, 18 Mo. 22.

4. MARRIED WOMAN'S DEBTS: rights of her creditors.

In the case of *Davis v. Smith*, *ante*, p. 219, we had occasion to discuss the nature of the obligation of a *femme covert* who had a separate estate when it was incurred. It is not a lien or a charge upon the property, until the creditor obtains a decree against it. Her general creditors, on demands existing against her before marriage, after her death or that of her husband, have an equal right to satisfaction of their demands out of what was her separate property with creditors who have no claim against her personally, but only demands which they may enforce against her separate property, while the latter class of creditors have no right whatever to satisfaction of their demands out of her general property Her marriage suspended the right of her creditors, then existing, to sue her alone and proceed against her separate or general property, but the dissolution of the marriage by the death of either the husband or the wife, revives the right of her general creditors against her and her property. The law charges all her property with payment of these debts, while nothing but a decree of a court of equity makes debts incurred during coverture a charge upon her separate property. The only effect of such a decree is to place such special creditors upon an equal footing with her general creditors as to her separate property, and this, and no other of her property, can they, under any circumstances, subject to the payment of their demands.

Adhering, therefore, to what was held in *Davis v. Smith*, if the testatrix here had no other than separate property, the plaintiff's demand "stands upon the same footing as other unpreferred demands against her estate." If, however, there is other property belonging to her estate, the general creditors, exclusively, shall have satisfaction of

their demands out of that property, and, if that be exhausted, leaving a balance of her general indebtedness unpaid, her general creditors have an equal right with this special creditor to payment of such balance out of her separate estate. Not observing this distinction in the judgment rendered, which is in all other respects correct, the court erred, and the judgment is reversed and the cause remanded for further proceedings in conformity with this opinion. We cannot enter up the judgment which the court below should have rendered, for the reason that the facts are not before us which would enable us to do so. It does not appear that the testatrix had other property or not, and that fact must be ascertained, in order that a complete and perfect judgment may be rendered in the cause. HOUGH and RAY, JJ., concur; SHERWOOD, C. J., and NORTON, J., dissent.

ORR, *Appellant*, v. LAWRENCE COUNTY.

The court re-affirms its former decisions holding township bonds issued in aid of railroads void.

Appeal from Lawrence Circuit Court.—HON. JOS. CRAVENS, Judge.

AFFIRMED.

N. Gibbs for appellant.

Thrasher & Young for respondent.

NORTON, J.—This suit was instituted in the circuit court of Lawrence county, to enforce the payment of certain coupons of a bond issued by the county court of said county for and in behalf of Pierce township, in said county, to the Memphis, Carthage & Northwestern Railway Com-

pany under the act of March 23rd, 1868. Acts 1868, p. 92. Upon the trial defendant obtained judgment, from which plaintiff has appealed. The judgment must be affirmed on the authority of the following cases: *Webb v. Lafayette Co.*, 67 Mo. 353; *State ex rel., etc., v. Brassfield*, 67 Mo. 331; *State ex rel. v. Sutterfield*, 54 Mo. 392; *State ex rel., etc., v. Winkelmeier*, 30 Mo. 103; *St. Joseph & Denver City R. R. Co. v. Buchanan Co. Ct.*, 39 Mo. 485; *State ex rel. etc., v. Holladay*, 72 Mo. 499. All concur except Judge HOUGH, who dissents, and Judge RAY absent.

URTON, *Plaintiff in Error*, v. SHERLOCK.

Texas Cattle Act. The Supreme Court of the United States in *Railroad Co. v. Husen*, 95 U. S. 465, and this court in *Gilmore v. Hannibal & St. Joseph R. R. Co.*, 67 Mo. 323, decided the 9th as well as the 1st section of the act restricting the importation of Texas, Mexican and Indian cattle, to be unconstitutional and void.

Error to Johnson Circuit Court.—HON. N. M. GIVAN, Judge.

AFFIRMED.

Comingo & Slover for plaintiff in error.

Boggess & Sloan for defendant in error.

RAY, J.—This cause was commenced before a justice of the peace in Bates county, on the 19th day of July, 1873, on the following account or statement, to-wit:

Nicholas Sherlock, David Cantwell and Washington Campbell, to Albert Urton, Dr.

To amount of loss sustained and damages done the cattle of said Urton, by reason of the communication of the disease commonly known as the Texas or Spanish fever to the cattle of said Ur-

ton, from the Texas, Mexican or Indian cattle, unlawfully brought into the State, to-wit: Between the 1st day of March and the 1st day of November, 1873, by said Sherlock, Cantwell and Campbell, ... $1,000.00

Before the justice, the plaintiff had judgment, from which an appeal was taken to the circuit court, where the cause was dismissed, and the case brought to this court, where, in October, 1875, it was reversed and remanded. See *Urton v. Sherlock*, 61 Mo. 257. After that the case was removed to Cass, and thence to Johnson county, by change of venue, where the defendants filed their motion to dismiss the cause, stating substantially as the ground thereof: 1st. That the court had no jurisdiction of the subject matter of the suit. 2nd. That the statute, under which the action is brought, is unconstitutional and void. This motion was, by the court, sustained, and the plaintiff, at the time, excepted to the opinion of the court in this behalf. The action of the court in sustaining this motion, is assigned as error, and is the only error complained of.

Since this case was here before, the questions involved in the above rulings of the Johnson circuit court, have been expressly passed upon and settled by the Supreme Court of the United States in the case of the *Railroad Co. v. Husen*, 95 U S. 465, in which it is held that the statute of Missouri, upon which the action, in the State court, was founded, was in conflict with the clause of the constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Missouri statute, involved in that case, is the same upon which this action is founded, and was there declared to be unconstitutional and void. This court, also, in the case of *Gilmore v. Hannibal & St. Joseph R. R. Co.*, 67 Mo. 323, recognizes and affirms the doctrine above announced in *Railroad Co. v. Husen*. The case at bar, it would seem, is

necessarily controlled by the principle decided in 95 U. S. and 67 Mo., above cited. The appellant, however, seeks to withdraw this case from the operation of the principle involved in the cases in 95 U. S. and 67 Mo., above cited. He seeks to predicate this suit upon the 9th section alone, of the Missouri statute in question, and claims that that section, properly construed, is a legitimate exercise of the admitted police power of the State, and not obnoxious to the charge of attempting to regulate inter-state commerce or transportation, plainly involved in the 1st section of said act. The appellant seems to regard the 1st section of said statute as alone involved in these decisions. In this, we think he misconceives the scope and extent of the decisions in question. An examination of the records in these cases will show that all of said actions are predicated upon both sections 9 and 1 of the Missouri statute, and that both sections are involved and expressly held to be unconstitutional and void. From the brief statement in the case of *Gilmore v. Hannibal & St. Joseph R. R. Co.*, 67 Mo. 323, it might be inferred that the 1st section alone, of the statute, was involved in that case; but an examination of the original record shows that that case also was based on both sections 9 and 1 of said statute. We cannot, therefore, see how the attempted distinction claimed by appellant can be maintained. The case at bar is also based on both of said sections, and is clearly within the operation and purview of the decisions above cited. The Johnson circuit court, therefore, committed no error in dismissing said cause. Its judgment is, therefore, affirmed. All the judges concur.

HAYS v. DOWIS *et al.*, *Appellants.*

Township Bonds issued in aid of railroads being void, as heretofore decided by this court, a levy of taxes to pay them may be prevented by injunction.

Appeal from Schuyler Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

J. B. Gamble for appellants.

Knott & Bailey for respondent.

NORTON, J.—This suit was instituted in the circuit court of Schuyler county to enjoin and restrain defendants, who composed the county court of said county, from levying a tax for the payment of certain bonds and coupons issued by said county court on behalf of Liberty township, in said county, to the Missouri, Iowa & Nebraska Railway Company. The injunction was granted and on final hearing made perpetual, and from this judgment defendants prosecute their appeal. The bonds for the payment of which the tax was about to be levied having been issued under the act of March 23rd, 1868, (Acts 1868, p. 92,) the action of the trial court in enjoining the defendants to levy a tax for their payment, was fully authorized by the following cases: *Webb v. Lafayette Co.*, 67 Mo. 353; *State ex rel. v. Brassfield*, 67 Mo. 331. Judgment affirmed, all concurring except Judge HOUGH.

THE STATE v. HARTNETT, *Appellant.*

1. **Criminal Law**: VENUE. No principle is better settled than that in a criminal case the venue must be proved as laid in the indictment. The proof may be either direct or indirect, but it must be one or the other, and the record must show it, or this court will reverse.
2. **Rape**: EVIDENCE. In a prosecution for rape, the prosecuting witness was asked by defendant's counsel what her object was in going to Scott's station, (where the rape was alleged to have been committed,) but the court refused to permit her to answer. *Held*, error.

Appeal from Cole Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

Belch & Silver and *Ewing & Hough* for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—Defendant was indicted in the Cole county circuit court at its December term, 1881, charged with the crime of rape. Upon this indictment he was tried and convicted, and brings the case here by appeal, assigning among others as a reason for reversing the judgment, that the record fails to show that the offense charged was committed in Cole county.

No principle is better settled than that in a criminal case the venue must be proved as laid in the indictment, and that in order to a conviction it is as important to prove that the offense was committed in the county where it is charged to have been committed, as to prove that the defendant committed it. This fact, like any other, may be established either by direct or indirect evidence, but it must be established either by one or the other of these methods. After a careful examination of the bill of exceptions, we fail to find either direct or indirect evidence of the fact that the crime charged was committed in Cole county, the evidence introduced, as shown by the record,

only tending to prove that the offense was committed near Scott's station. There was no evidence that Scott's station was in Cole county. As the fact of venue is always susceptible of direct proof, it may have been made in this case, but if so, the record before us (upon which we alone can act), whether through inadvertence or otherwise, fails to disclose it, and under authority of the case of the *State v. Hughes*, 71 Mo. 633, the record in which case is similar to the one in this, the judgment will be reversed and cause remanded.*

It is proper to state, as the cause will be retried, that while I do not think error was committed by the court in refusing to allow the prosecuting witness to state, in answer to a question asked by defendant's counsel, what was her object in going to Scott's station, a majority of the court are of opinion that the question was a proper one and that the witness ought to have been permitted to answer it.

Except in the particulars mentioned the cause seems to have been fairly and properly tried. All concur.

HUNT v. THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error.*

1. **Ejectment**: PLAINTIFF'S TITLE. In ejectment it is error for the court to leave it to the jury to determine whether the plaintiff is the owner of the premises, without instructing them as to the legal effect of the deeds read in evidence.

2. ——: ——. If plaintiff's paper title be insufficient he can only recover either upon the ground of continued adverse possession for ten years prior to defendant's entry, or upon proof of prior possession under claim of right.

See also *The State v. McGinniss*, 74 Mo. 245; *The State v. McGrath*, 73 Mo. 181.

Error to Cooper Circuit Court. — HON. GEO. W. MILLER, Judge.

REVERSED.

A. & J. F. Lee, Jr., for defendant in error.

Draffen & Williams for plaintiff in error.

NORTON, J.—This is an action of ejectment to recover the possession of the north half of lot number 167, in the city of Boonville; the petition being in the usual form, and the answer a general denial.

On the trial plaintiffs obtained judgment, from which defendant has prosecuted his writ of error, and seeks a reversal of the judgment upon various grounds, the most material and chief of which is the action of the court in giving and refusing instructions.

The instructions given for plaintiff, are as follows: 1. If the jury shall find from the evidence that the plaintiff was, on the 15th day of June, 1868, the owner of the lot described in the petition, and that she has not since parted with her title or interest therein, then the plaintiff is entitled to the possession of said lot, and the jury will find for the plaintiff.

2. If the jury find for the plaintiff, they will assess her damages at such sum as they may find from all the evidence that plaintiff has sustained by loss of rents and profits of said lot since defendant took possession thereof, and had notice of plaintiff's claim thereto down to the present time, not exceeding the amount claimed in the petition, and the jury will further state in their verdict the value of the monthly rents and profits.

The instructions given for defendant, are as follows: 1. The jury are instructed that it devolves upon the plaintiff to show by evidence, to the satisfaction of the jury, that at the time of the institution of this suit she had

the legal title to the property sued for; and unless this proof has been made, the jury must find for the defendant.

4. If the jury should find the issue for the plaintiff in this case, they are instructed that in estimating the damages for the rents and profits of said premises, they will only estimate the same from the time this suit was commenced.

The instructions asked by defendant and refused, are as follows: 2. The jury are instructed that the only evidence of title offered by the plaintiff in this case is a deed from J. B. C. Lucas to Anne Lucas Hunt, and a deed of partition from James H. Lucas to this plaintiff, and these deeds of themselves do not put the legal title to the property in the plaintiff, and the jury must find for defendant.

3. The jury are instructed that the deeds read in evidence do not place the legal title to the lot sued for in the plaintiff, and that the plaintiff has not shown a legal title to said lot mentioned in the petition; and before she can recover in this case the plaintiff must show by evidence, to the satisfaction of the jury, that prior to the time that the defendant, and those under whom it claims, entered into possession of the lot sued for, the plaintiff, or those under whom she claims, were in the actual possession of said lot, claiming the same under said deeds; and the mere claim of title and the payment of taxes without actual possession is not of itself sufficient to entitle the plaintiff to recover; and unless such prior actual possession has been shown, to the satisfaction of the jury, they ought to find for defendant.

On the trial plaintiff offered various deeds, which it is unnecessary here to notice, further than to say that they were insufficient to establish title in plaintiff to the lot in controversy, and this is conceded by counsel for plaintiff. This fact being conceded, we are at a loss to perceive on what ground the court gave instructions to the jury predicating plaintiff's right to recover upon the strength of her

title, when there was no evidence of paper title, and without so directing them.

Whether the deeds offered in evidence were sufficient to show title in plaintiff, was a question for the court to determine, and the reference of it to the jury in the manner it was referred by the instructions, was clearly erroneous. *Bailey v. Ormsby*, 3 Mo. 580; *Hickey v. Ryan*, 15 Mo. 63; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Wiser v. Chesley*, 53 Mo. 547.

1. EJECTMENT: plaintiff's title.

The deeds offered in evidence being insufficient to authorize a recovery, plaintiff could only recover either upon the ground of continued adverse possession for ten years previous to the entry of defendant, or upon proof of prior possession under claim of right. *Bledsoe v. Simms*, 53 Mo. 305; *Matney v. Graham*, 59 Mo. 190; *Alexander v. Campbell*, 74 Mo. 142. Neither of these questions was submitted to the jury, but on the contrary, instruction numbered three which proposed to submit one of them, and the only one which the evidence as preserved in the record before us in anywise tended to show, was refused.

2. ——: ——.

In the refusal of this instruction, as well as in giving those that were given, without telling the jury what was the legal effect of the deeds read in evidence, the court committed error, and the judgment will be reversed and cause remanded, in which all concur.

TREMMEL, *Plaintiff in Error*, v. KLEIBOLDT.

Curtesy in Wife's Separate Estate. A conveyance to the sole and separate use of a married woman does not debar her husband from curtesy in lands of which she died in the actual possession, or the rents, issues and profits of which she received through her trustee, unless it appears from the deed that such result was intended by the grantor. A covenant on the part of the trustee to convey the property at her death as she may appoint, and in default of appointment then to her heirs; *Held*, not to indicate such intent.

Error to St. Louis Court of Appeals.

AFFIRMED.

Finkelnburg & Rassieur for plaintiffs in error.

The estate of Louisa Kleiboldt was a life estate, with power of appointment; the contingent remainder to her heirs could only unite with her life estate, so as to give her the fee, by virtue of the rule in *Shelley's case*, which does not exist in Missouri. 2 Wag. Stat., § 6, p. 1351; 2 Wash. Real Prop., (4 Ed.) pp. 598, 599, top; *Pendleton v. Bell*, 32 Mo. 100. Even the rule in *Shelley's case* would not enlarge the wife's life estate into a fee, her estate for life being equitable, and the remainder, as executed by the statute, being legal. 2 Wag. Stat., § 1 p. 1350; *Roberts v. Moseley*, 51 Mo. 282; 1 Fearne on Rem., 51, 54; *Lord Say & Seal v. Lady Jones*, 3 Bro. Par. Cas. 113. There is no tenancy by the curtesy in Missouri, except as against the devisee of a married woman's legal estate. Wag. Stat., 529; Ib., p. 935, § 13. There is no tenancy by the curtesy in the separate estate of a married woman, it being one *sui generis*. *Kimm v. Weippert*, 46 Mo. 532; *Gay v. Ihm*, 69 Mo. 584; *Jaques v. M. E. Church*, 17 Johns. 548; *Townshend v. Matthews*, 10 Md. 251; *Liptrot v. Holmes*, 1 Ga. 381; *Cochran v. O'Hern*, 4 Watts & S. 95; *Stokes v. McKibben*, 13 Pa. St. 268; *Clark v. Clark*, 24 Barb. 581; *Pool v. Blakie*, 53 Ill. 495. There is no tenancy by the curtesy where the language, as in the present case, is fairly inconsistent therewith. *Clark v. Maguire*, 16 Mo. 302; *Morgan v. Morgan*, 5 Mad. Ch. 245; *Marshall v. Beall*, 6 How. 78; Schouler Dom. Rel., (2 Ed.) 195; 1 Wash. Real Prop., (4 Ed.) p. 169; *Gause v. Hale*, 2 Ired. Eq. 241; *Woodcock v. Duke of Dorset*, 3 Bro. C. C. 569.

Kehr & Tittman for defendant in error.

HOUGH, J.—This is an action of ejectment. The

plaintiff, Elizabeth Tremmel, is the wife of her co-plaintiff, Frank Tremmel, and is the daughter of the defendant, and of the defendant's deceased wife Louisa, and is sole heir at law of her mother.

On the 2nd day of January, 1871, the defendant conveyed the premises in controversy to one Gotlieb Wittler, as trustee, for the sole and separate use of his wife, Louisa. The portions of said deed which are material to the present controversy, are as follows: "To have and to hold the same, with all the rights, privileges and appurtenances thereto belonging, or in anywise appertaining, unto him, the said party of the second part, his heirs and assigns forever. In trust, however, to and for the sole and separate use, benefit and behoof of the said Louisa Kleiboldt, wife of Theodore Kleiboldt; and the said Gotlieb Wittler, party of the second part, hereby covenants and agrees to and with the said Louisa Kleiboldt, that he will suffer and permit her, without let or molestation, to have, hold, use, occupy and enjoy the aforesaid premises with all the rents, issues, profits and proceeds arising therefrom, whether from sale or lease, for her own sole use and benefit, separate and apart from her said husband, and wholly free from his control or interference, or from his debts, in such manner as she may think proper, and that he will at any and all times hereafter, at the request and direction of the said Louisa Kleiboldt, expressed in writing signed by her or by her authority, bargain, sell, mortgage, convey, lease, rent, convey by deed of trust for any purpose, or otherwise dispose of said premises or any part thereof, and will pay over the rents, issues, profits and proceeds thereof to her, the said Louisa Kleiboldt, in such manner as she shall in writing direct or request, and that he will, at the death of the said Louisa Kleiboldt, convey or dispose of the said premises, or such part thereof as may then be held by him under this deed, and all profits and proceeds thereof, in such manner, to such person or persons, and at such time or times as the said Louisa Kleiboldt shall by her last will

and testament, or any other writing signed by her or by her authority, direct or appoint, and in default of such appointment, then that he will convey such premises to her legal heirs."

The plaintiffs claim possession under a conveyance from Wittler, the trustee, to Elizabeth Tremmel, executed after the death of her mother, Louisa Kleiboldt, and the defendant claims possession as tenant by the curtesy. The circuit court held that the defendant was entitled to possession as tenant by the curtesy, and rendered judgment in his favor. The judgment of the circuit court was affirmed by the court of appeals, and the plaintiffs have appealed to this court.

It is well settled that the husband is entitled to curtesy in all estates of inheritance of which the wife dies seized, either at law or in equity. As to equitable estates, actual possession by the wife, or the receipt by her of the rents, issues and profits, or possession by a trustee for her benefit, is equivalent to legal seizin—and the limitation of such estates to the sole and separate use of the wife, will not debar the husband from curtesy, as such limitation necessarily terminates upon the death of the wife. *Alexander v. Warrance*, 17 Mo. 228; *Baker v. Nall*, 59 Mo. 265; Lewin on Trusts, 622; *Watts v. Ball*, 1 P. Will. 108; *Parker v. Carter*, 4 Hare 400; *Morgan v. Morgan*, 5 Mad. 408; *Follett v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, 8 Law Rep. (Eq. Cas.) 139; *Mullany v. Mullany*, 4 N. J. Eq. 16; *Cushing v. Blake*, 30 N. J. Eq. 689. By the terms of the deed under consideration the entire estate was vested in the wife, and no remainder was or could be created by the covenant of the trustee to convey the property to her legal heirs, at her death, in default of appointment or other disposition thereof, by her during her life. *Green v. Sutton*, 50 Mo. 186; 2 Black. Com., 164. And we are of opinion that this covenant of the trustee fails to indicate a purpose on the part of the grantor, to deprive himself of his right to curtesy. The conveyance, with this covenant in it, amounts

to no more than a conveyance to the trustee for the use of the wife, her heirs and assigns, as was the case in *Appleton v. Rowley, supra.* It is in all respects similar to the conveyance passed upon in *Cushing v. Blake, supra*, and while the rule in *Shelley's case* was invoked in that case in order to enlarge the estate of the wife to a fee, the direction to the trustee to convey to her heirs, at her death, was held to be insufficient to exclude the right of the husband to curtesy, although it was urged by counsel as indicating such an intent.

The case of *Roberts v. Moseley*, 51 Mo. 282, cited by appellant's counsel as deciding that the husband is not entitled to curtesy in the separate estate of his wife, is evidently misunderstood by them. No such question arose, or was considered in that case. There, the deed from Geo. W. Moseley to Armstrong, the trustee, conveyed the land "for the sole use and benefit of the said Ann M. Moseley, her heirs and assigns forever, and in further trust, that the said Ann M. Moseley shall have the use and occupation of said lands, and take and enjoy the rents and profits of the same for her sole use and benefit." When the suit was brought, George W. Moseley, the husband, and Ann M. Moseley, the wife, were both dead. The court said: "Upon the death of George W. Moseley, the use thus created became immediately executed in Ann M. Moseley, and if she was dead, then in her legal heirs, and thus the whole legal estate was then vested in the *cestui que use* by virtue of the statute of uses." In the case at bar, upon the death of the wife, the estate vested in her heir, subject to the intervening particular estate of the defendant as tenant by the curtesy. The draughtsman of this conveyance was, doubtless, of opinion that the statute of uses operated only upon the first use, and that the heirs could not be invested with the legal title without a conveyance from the trustee, and hence inserted a covenant on his part to convey to them, and such was the opinion of Judge Adams in *Roberts v. Moseley, supra*, which was decided in 1873.

As it does not appear in the conveyance in question that there was any purpose on the part of defendant to deprive himself of a right to curtesy, the judgment of the court of appeals will be affirmed. The other judges concur.

DUNN v. MILLER, *Plaintiff in Error.*

1. **Presumption of Deed.** A deed will not be presumed where there is a chain of title apparently perfect, and upon which the possessor appears to have relied to sustain his possession.

   Thus, where plaintiff in ejectment at the trial in 1877 offered in evidence deeds constituting a complete chain of title, including a deed from one L. dated in 1817, and in addition showed possession in himself and those under whom he claimed from 1841 or 1842 down to 1872, and defendant, in rebuttal, showed an outstanding title in one G. under a conveyance from L. dated in 1808; *Held*, that there was no ground to presume a re-conveyance from G. to L. between 1808 and 1817.

2. **Husband and Wife**: WIFE'S REAL ESTATE. Prior to the 22nd of June, 1821, there was no law in the State or Territory of Missouri that authorized the wife or the husband, or both of them together, to convey the wife's real estate during the marriage.

3. **Ejectment**: WRIT OF POSSESSION. In contemplation of law the enforcement of a writ of possession in an action of ejectment puts an end to the adverse possession of defendant as of the day of the institution of the suit.

4. **Ejectment.** Plaintiff in ejectment cannot recover upon a prior possession of less than ten years since the emanation of the legal title from the United States government, when defendant's present possession is under claim and color of title; especially if he obtained possession from the plaintiff by a former action of ejectment.

5. ——: OUTSTANDING TITLE: ADVERSE POSSESSION. Adverse possession will avail nothing as against a good outstanding title unless it has been held for the statutory period.

Appeal from St. Louis Court of Appeals.

REVERSED.

D. T. Jewett for plaintiff in error.

The judgment in the former suit is conclusive that in May, 1872, the right of possession was in Miller, and that it continued in him till at least after judgment, because our statute of ejectment provides that if the plaintiff's right of possession expires before judgment, it may be pleaded, and he shall only have judgment for costs and damages to that time. It also settles the question that Dunn cannot recover in this action on any *presumption* of title arising from the fact of possession before May, 1872. *Whitney v. Wright*, 15 Wend. 179; *Jackson v. Rightmyre*, 16 John. 325; *Arnold v. Arnold*, 17 Pick. 4; *Jackson v. Tuttle*, 9 Cow. 234; *Jackson v. Walker*, 7 Cow. 642; *Beebe v. Elliott*, 4 Barb. 457; *Marshall v. Shafter*, 32 Cal. 185, 196. It also results from that judgment that Dunn had no possession to count after May, 1872. There was no statute in Missouri till 1821 authorizing a husband and wife to convey the wife's land. Prior to the adoption of the common law in 1816, the Spanish law was in force in the territory of Missouri. There never was any Spanish law, that I can find, that authorized the wife alone, or the husband and wife alone, or the husband and wife together to convey the "dote" or the "arras," that is, the lands given by the wife to the husband, or the husband to the wife, on marriage. Neither did the common law when it came into force authorize it. Under that system a married woman's property could only be conveyed by fine and recovery, a process in court. 3 Washb. Real Prop., p. 217, § 17; Bouv. Law Dic., title "Fine;" *Garnier v. Barry*, 28 Mo. 345. A conveyance will not be presumed unless it would have been lawful if made. It cannot, therefore, be presumed in this case. Moreover, if Lucas was alive in 1817, he was tenant for life of the New Madrid land, had the right of possession and such title, as our courts have repeatedly decided, as would maintain or defend our action of ejectment, and as

could be sold and give his grantee the same rights he had. That a man holding such a title conveys a fee, is no fact upon which to found a presumption of the existence of a deed to him of the fee. *Jackson v. Mancius*, 2 Wend. 357. There was no occasion for her to join in a deed to his interest in the land. All that was done would naturally be done without her. She could not have prevented it. No presumptions can be made against the rights of a married woman; her hands are tied. *Meegan v. Boyle*, 19 How. 146, 150. She could not prevent her husband selling the land and putting the grantee into possession; for, under all laws, he had the right of possession, and could transfer that, if he could not the fee even when joining with her. There is nothing in this case to show that Mrs. Lucas ever sanctioned, or had any knowledge of this pretended sale, or of any exchange of land. No presumption from knowledge and silence can be drawn. But, further: The presumption of a deed can be invoked only by one who holds under the title to be made out by the deed, the existence of which is to be presumed. The lost deed must be a part of his title. *Dessaunier v. Murphy*, 27 Mo. 51. There is no case where a party has been allowed to presume a deed to destroy his opponent's title or a chain of title put in by his opponent, when the party invoking the presumption does not ask it in his chain of title.

Henry M. Bryan for defendant in error.

Upon these grounds: thirty years of continuous, peaceable possession; purchase for full consideration of the only title of record in St. Louis county, emanating from the person whom the United States recognized as the true owner of the New Madrid land, and from whom it received a deed reciting the fact and evidence of such ownership; the expenditure of money in good faith in constructing a home and making other improvements; the payment of taxes; the fact that the land in controversy is but parcel of a large

tract of land in the immediate vicinity of the city of St. Louis, that up to 1872 it had been claimed and possessed under title from Chas. Lucas alone, subdivided into city lots and blocks, bought and sold and built upon in undoubting confidence in that title, with no adverse claim on the part of Sarah Lucas for fifty years, or at least with no notice (actual or constructive) of that claim by any of the occupants of the John Brooks survey, we ask the court to presume a deed from Sarah Lucas; on the ground, in brief, that the existence of the deed is consistent with all the facts and circumstances of this case, and inconsistent with none. *Dominy v. Miller*, 33 Barb. 386; *Mayor v. Horner*, Cowp. 102; *Eldridge v. Knott*, Cowp. 214; *Archer v. Saddler*, 2 Hen. & Mun. 370; *Stillman v. White Rock, etc., Co.*, 3 Wood. & M. 541; *Bedle & Beard's case*, 12 Co. 5; *Hillary v. Waller*, 12 Ves. 239; *Fishar v. Prosser*, Cowp. 217; *Prevost v. Gratz*, 6 Wheat. 481, 504; *Ricard v. Williams*, 7 Wheat. 109; *Jackson v. McCall*, 10 John. 380; *Jackson v. Pratt*, 10 John. 381; *Jackson v. Lunn*, 3 John. Cas. 109; *Beall v. Lynn*, 6 Harr. & J. 361; *Rhode Island v. Massachusetts*, 4 How. 639; *Piatt v. Vattier*, 9 Pet. 405; *Ewing v. Burnet*, 11 Pet. 41; *Newman v. Studley*, 5 Mo. 295; Starkie Evidence, part 4, 12, 27, 28; *McNair v. Hunt*, 5 Mo. 300; *McDonald v. Schneider*, 27 Mo. 411; *Allston v. Saunders*, 1 Bay (S. C.) 26; *Jackson v. Miller*, 6 Wend. 228; *Bealey v. Shaw*, 6 East 213; *Melvin v. Proprietors*, 16 Pick. 137; *s. c.*, 17 Pick. 255; *Thomson v. Peake*, 7 Rich. (S. C.) 353; *Smith v. Asbell*, 2 Strobh. 141; *Gilchrist v. McGee*, 9 Yerg. 455; *Williams v. Donell*, 2 Head 695; *Nixon v. Carco*, 28 Miss. 414; *Wallace v. Fletcher*, 30 N. H. 434; *Caruthers v. Eldridge*, 12 Gratt. 670; *Mason v. McLean*, 13 Ired. 262; *McLeod v. Rogers*, 2 Rich. 19.

W. H. Clopton also for defendant in error.

In *Whitney v. Wright*, 15 Wend. 179, relied on by defendant, the former recovery had been acquiesced in for

thirteen years, and the prior possession was without evidence of title. In *Jackson v. Rightmyre*, it was held that a presumption founded on a prior possession—a mere naked possession—perished with the loss of that possession by judgment and execution eighteen years before. These cases hold that an entry under judgment destroys presumptions of title acquired by possession merely—that transmutation of title accomplished by mere entry and adverse possession for a long period, defined in *Nelson v. Brodhack*, 44 Mo. 596; *Merchants' Bank v. Evans*, 51 Mo. 335; *Shepley v. Cowan*, 52 Mo. 559; *Barry v. Otto*, 56 Mo. 177; *Ridgeway v. Holliday*, 59 Mo. 444. These cases held that ten years' possession will not only extinguish the true owner's title, but will confer it upon the adverse occupant. It is the presumption of that kind of title which the cases relied on by defendant hold to be extinguished by an entry under judgment. I think the principle of those cases is that the adverse occupant had abandoned the rights he had acquired by limitation. An examination of the cases will show that a long time elapsed between the evictions and the new suits. The presumption invoked by plaintiff was a presumption of grant; that Sarah Lucas (or Graham) conveyed to Charles Lucas between the date of the marriage contract, to-wit: December 8th, 1808, and the date of the deed by Charles Lucas to Tanner, November 5th, 1816. The possession under Charles Lucas cannot be explained, except by the presumption of such a deed. There is absolutely nothing tending to rebut that presumption, except the deed from Sarah Lucas to Gillespie purporting to have been made in 1821, recorded 1872. Defendant refused to introduce that deed although he had the same proofs as to its execution, on which it was admitted in *Miller v. Dunn*, but falls back on his entry under execution and says it extinguished the presumption of a grant from Sarah Graham, or Sarah Lucas, to Charles Lucas.

RAY, J.—This is an action of ejectment to recover a

tract of land included in United States survey 2541, which was made under New Madrid certificate No. 164 in the name of John Brooks or his legal representative. The land in question, as well as the parties to the action, are the same as those involved in the case of *Miller v. Dunn*, 62 Mo. 216. In this suit, as in the former action, both parties claim under Charles Lucas as the common source of title. A jury having been waived, the cause was tried by the court.

In this action, the plaintiff, after introducing evidence tending to show that John Brooks was the original claimant and owner of the New Madrid land in question, offered in evidence a deed for said land from said Brooks to said Charles Lucas, dated in 1807. He next offered a conveyance from said Lucas to James Tanner, bearing date 1st of January, 1817, and then proceeded to put in evidence what, upon its face, purported to be a formal, regular and unbroken chain of paper title, transferring and conveying to himself whatever title said Lucas, the common grantor, may have had to said lands at the date of his deed to said Tanner; the various conveyances thus offered all being of record in the proper office. The plaintiff then proceeded to show that he, and those under whom he claimed, had been in the actual adverse possession of the land, claiming the same under the chain of title thus put in evidence, from 1841 or 1842 up to May, 1872—the time at which the original suit of *Miller v. Dunn*, *supra*, was commenced, and under which, by due judgment and process of law, the said Dunn was turned out and the said Miller put in the possession of said land at the termination thereof in April, 1876. It also appeared that no person had ever been in the actual possession of said land prior to 1841 or 1842, when Gay first took the possession. The plaintiff also put in evidence the act of Congress of June 30th, 1864, releasing and transferring the legal title to said land to the said John Brooks, or his legal representative. Here the plaintiff rested.

Such in substance was the chain of title put in evidence by the plaintiff, and under which he claimed that he had a perfect paper title to the land in controversy. There was no pretence or intimation that there was any broken link or lost deed in his chain of title necessary to make it valid and complete. He also claimed that the title thus put in evidence, and on which he rested, constituted him, under the congressional grant aforesaid, the legal representative of John Brooks, and as such the owner of the legal title.

At the close of the plaintiff's testimony, the defendant Miller, by way of defense, first put in evidence a deed from the said Charles Lucas to Sarah Graham, bearing date the 8th day of December, 1808, and conveying the lands in controversy to the said Sarah Graham, in contemplation of a marriage between said parties thereto shortly thereafter to take place. This marriage settlement was also duly recorded in the proper office on the 29th day of April, 1809. The defendant next offered evidence of the subsequent marriage of said Lucas and Graham, as contemplated by said deed, and also of the death of the said husband, Lucas, sometime prior to 1820. The defendant then put in evidence the entire record of the prior suit of *Miller v. Dunn*, including all the proof and title papers relied on by both parties to said action, together with the final judgment rendered therein in favor of said Miller and against said Dunn, as well as the execution in said cause, by and under which the said Dunn was turned out and the said Miller was put in the possession of the premises sued for in April, 1876, and the further fact that he had so remained in possession of said land, claiming thereunder, ever since and up to the time of the institution of this suit in 1877. In the former suit, Miller, the plaintiff therein, put in evidence a deed from Sarah Lucas to A. P. Gillespie, dated in March, 1821, and recorded in February, 1872, and then traced title thereunder to himself. In this suit said Miller did not offer said deed, or the title traced there-

under, except as the same appears in and as a part of said record of said suit of *Miller v. Dunn* as aforesaid. Here the defendant rested.

In rebuttal, the plaintiff gave evidence to show that on the trial of the former suit of *Miller v. Dunn* no objection was made to the Sarah Lucas deed to Gillespie on the ground that it was a forgery, and then offered to prove that said deed was a forgery, and that he did not know or have any reason to know that it was such, until after the case of *Miller v. Dunn* was decided by the circuit court, and had been appealed to the Supreme Court; but the court excluded the testimony so offered.

Whereupon the court, at the instance of the plaintiff, and against the objections of the defendant, made the following declarations of law, to-wit:

1. If the court finds from the evidence in the cause that neither Sarah Lucas nor any one as tenant of hers had been in possession of the land in controversy from June 30th, 1864, to the commencement of this suit, then no title in Sarah Lucas, or her legal representatives, can be set up as outstanding in bar of this suit.

2. The act of congress of June 30th, 1864, read in evidence by plaintiff, vested in the legal representatives of John Brooks, the legal title to the property described in the petition, if said property is included within the lines of United States survey 2,541, under certificate No. 164, and said property was at the said time of said survey open to location under said certificate No. 164. And if the court finds that John Brooks, or his legal representatives, filed his claim for his head-right of 709 arpents before the board of commissioners under the act of congress, and that said claim was confirmed by said board to John Brooks, or his legal representatives, and that John Brooks executed to Charles Lucas the deed read in evidence by plaintiff, and that Charles Lucas, claiming to be the owner of the New Madrid land, confirmed as aforesaid, caused proof to be made before the United States Recorder of

Land Titles, that said lands were materially injured by earthquakes, and did, as such owner, on the 5th day of November, 1816, execute the deed of relinquishment to the United States Government, of said lands, read in evidence by plaintiff, and in lieu thereof received New Madrid certificate No. 164, read in evidence, and that said Lucas executed the deed to James Tanner, read in evidence, and James Tanner executed the deed to McKnight and Brady, read in evidence, and that said McKnight and Brady applied to the United States Surveyor to locate for them as legal representatives of John Brooks, the said New Madrid certificate No. 164, and that said survey 2,541 was located for them upon said application under said certificate 164, and that the several deeds read in evidence by plaintiff from said McKnight and Brady and others were executed and delivered and recorded in conformity to law, and describe the property sued for, and plaintiff and those under whom he claims title had and held, prior to May 16th, 1872, for thirty years, the open, notorious, continuous, exclusive, adverse and uninterrupted possession of said land, under the chain of title introduced by him, and for more than fifty years prior to said 16th day of May, 1872, neither the defendant nor any other claimant under Sarah Lucas took any means to bring to the knowledge of plaintiff, and those under whom he claims, that they had or claimed any right, title or interest to said property under Sarah Lucas or otherwise, and that neither defendant nor any one else claiming under Sarah Lucas ever had possession of any part of the premises prior to April, 1876, nor paid taxes on the same, then the court, sitting as a jury, presumes a re-conveyance from Sarah Graham to Charles Lucas of the New Madrid land confirmed to John Brooks, between the 8th day of December, 1808, and the 5th day of November, 1816, or other valid transfer thereof between said dates, and that plaintiff is the legal representative of John Brooks to the premises in controversy, and as such, is entitled to recover in this action.

The court thereupon found for the plaintiff and rendered judgment accordingly; whereupon the defendant, after an unsuccessful motion for a new trial, by writ of error took the case to the St. Louis court of appeals, where the judgment of the trial court was affirmed, and the defendant then appealed to this court.

As the decision of this case, from the view we have taken of it, depends upon the propriety of the rulings involved in the above instructions, or declarations of law, given for the plaintiff, we deem it unnecessary to set out or consider those given or refused on the part of the defendant, or to make any fuller statement of the case than as appears above, or may be suggested in the progress of this opinion.

From the above declarations of law for the plaintiff, it would seem that the plaintiff, after the coming in of the evidence for the defendant, was forced to concede that, upon the face of the papers and the case thus made, the legal title appeared to be outstanding in Mrs. Sarah Lucas, and in order to get rid of this fatal defect in his title, the court was asked to presume and did presume a re-conveyance of said land from Sarah Graham to Charles Lucas, or other valid transfer thereof sometime prior to the date of the deed from Lucas to Tanner in January, 1817, under which plaintiff claimed title. This presumption so made, seems to have been the turning point upon which the case was decided by the trial court, and affirmed by the St. Louis court of appeals. 8 Mo. App. 471. Was the case at bar such a case as justified the application of the doctrine of presuming deeds, as laid down in the books on this subject? If so, the case should be affirmed; if not, it ought to be reversed. The doctrine on that subject, as laid down by Tyler on Ejectment and Adverse Enjoyment, 568, 569, is thus stated by that author: "Presumptions of grants of land often arise, but never unless the lapse of time be so great as to create a belief that such grants were actually made, or unless the case

1. PRESUMPTION OF DEED.

made shows that the party claiming the presumption was legally or equitably entitled to it. A conveyance will not in general be presumed where the original enjoyment was consistent with the fact of there having been none. *

* Presumptions of grants are founded upon the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They may be encountered by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant." Other authorities too numerous to mention are to the same effect. Apply these principles to the case at bar, and how stands the case?

In the present case, the possession of the plaintiff, and those under whom he claims, was based upon the paper title put in evidence by him, which, upon its face, purports to be, and *prima facie* was, a perfect chain of title. Plaintiff so claimed and presented it, and rested his case upon it. His possession, and that of those under whom he claims, is perfectly consistent with the title so shown by him. There was no occasion or necessity for the presumption in question. His title, apparently, was perfect without it, and negatived all thought or suspicion of the existence or loss of the deed presumed. All the facts and circumstances of plaintiff's possession, title and claim, as put in evidence by him, are perfectly consistent with the non-existence of the re-conveyance presumed by the court, and the rule in all such cases is that no such presumption can fairly arise. This is not a case where the evidence shows a long and uninterrupted possession of land, and where no title appears on either side or otherwise; or where there is an apparent and admitted defect in plaintiff's chain of title, as presented and claimed by him. It is in such cases generally where the doctrine of presuming deeds and grants, applies and is allowable. But that is not this case. There was no charge or intimation, by plaintiff, that there was any gap or break in his title, that

called for the presumption subsequently asked and made. From the case as presented and relied on by him, it might be inferred that he had no knowledge or suspicion of the existence of the outstanding title in Mrs. Lucas, under the marriage settlement; or if he had, he impliedly repudiated its validity and force. How can he then, when confronted with this unknown or discarded outstanding title in Mrs. Lucas, turn round and ask the court to presume the existence of the re-conveyance so made by the trial court at his instance? In a case like this, will he be permitted to do it? If so, it is difficult to imagine a case where an outstanding title might not be gotten rid of in the same way. There is nothing in the doctrine of presuming deeds in proper cases, as given in the books, which warrants the ruling of the court in this instance. Such a presumption in this case would be a most unreasonable and violent presumption, and contrary to all the probabilities in the case.

Were there any doubt about the correctness of this view of the case, there is another fatal objection to the presumption so made. It has been held by this court, as may be remembered, that, by the law of this State prior to the 22nd of June, 1821, it was not competent for the wife or husband, or for both of them together, to convey the wife's real estate, during the existence of the marriage. *Garnier v. Barry*, 28 Mo. 445; 1 Terr. Laws, p. 757. It was during this period, if at all, the re-conveyance presumed must have been made; and even if the re-conveyance, so presumed, had, in point of fact, been made, it would have been inoperative to transfer the title, so existing and outstanding in the wife.

2 HUSBAND AND WIFE: wife's real estate.

To have presumed that Sarah Graham re-conveyed to Charles Lucas before their marriage, is, under the circumstances, a most violent and improbable presumption; without anything to support it, contrary to all the reasonable probabilities of the case and wholly unauthorized.

The force and effect of the marriage settlement shown

by the defendant, was to vest the title to the land in question in Mrs. Lucas, subject only to the marital rights of her husband, which terminated with his death, at some period prior to 1820. *Miller v. Dunn*, 62 Mo. 221.

There was no actual possession of this land, under the deed from Lucas to Tanner, by any one during the life of Lucas; or for twenty-one or twenty-two years after his death. In the former case of *Miller v. Dunn*, *supra*, this court held, that under the decision of *Gibson v. Chouteau*, 13 Wall. 92, possession for the period named in the State statute of limitation is no bar, until the legal title passes out of the United States. See also *McIlhinney v. Ficke*, 61 Mo. 329. Under that ruling it must be held that no possession of plaintiff, or those under whom he claims, prior to the date of the congressional grant of June, 1864, can avail him anything in making out title by limitation. Nor can his possession since that date confer such title, as the statutory period had not elapsed when the suit of *Miller v. Dunn* was commenced, in May, 1872, at the termination of which, in 1876, he was turned out and the defendant placed in said possession, under due process of law, issued in said cause. The effect of said suit, and the transfer of said possession following thereunder, by due process of law, was to work, in contemplation of law, a termination of his adverse possession with the commencement of that suit in May, 1872. It follows, therefore, that plaintiff's continued possession, between the beginning and termination of that suit, cannot in this suit avail him anything, in computing the statutory period of his adverse possession necessary to confer title.

3. EJECTMENT: writ of possession.

Neither can the plaintiff, in this action, predicate a recovery upon any prior possession he, or those under whom he claims, may have had or shown, as it appears that the defendant is in possession, under claim and color of title; and more especially, as it also further appears that he obtained that possession from this plaintiff under judicial proceedings for that purpose, in a court of

4. EJECTMENT.

competent authority. The doctrine of allowing a recovery on prior possession, generally, is also limited to cases where the defendant is a mere intruder or trespasser, and does not extend to a case like this, where the defendant is in under claim and color of title. *Bledsoe v. Simms*, 53 Mo. 315. In cases like this, also, where the prior possessor has been turned out by an opposing claimant in judicial proceedings, all presumptions in his favor, growing out of said prior possession, if not terminated, are at least shifted in favor of his successful opponent. *Jackson v. Rightmyre*, 16 John. 325, 326; *Jackson v. Tuttle*, 9 Cow. 283; *Whitney v. Wright*, 15 Wend. 171.

The doctrine asserted in the first paragraph of said instructions is manifestly not the law. Whether Mrs. Lucas, or any one as her tenant, was in possession of the land in controversy from the 30th day of June, 1864, to the commencement of this suit, is wholly immaterial; provided, no adverse claimant during that period has held such possession for the statutory period, under such circumstances, as will confer upon him title by limitation; and as we have already seen, the possession so held by plaintiff, partly before and partly after the commencement of the suit of *Miller v. Dunn*, *supra*, was not such a possession. It would seem, therefore, that the title outstanding in Mrs. Lucas is a valid and subsisting title, unbarred by any adverse possession shown in this case.

5. ——: outstanding title: adverse possession.

If it be true, as charged by the plaintiff, (the proof of which was offered, but excluded by the court,) that the deed from Mrs. Lucas to Gillespie, put in evidence by the plaintiff in the case of *Miller v. Dunn*, was in fact a forgery, it may not be amiss here to remark that whether the defendant in that suit would now be heard by appropriate proceedings for that purpose to set aside the judgment in that case, on the ground of fraud, and have the possession thereby lost restored to him, and thus do away the force and effect of that judgment, with its incidents, presump-

tions and consequences, are questions not now before the court, and about which we express no opinion.

For the reasons hereinbefore set out, the judgment of the trial court, as well as that of the St. Louis court of appeals affirming the same, are hereby reversed and the cause remanded.

Motion for rehearing overruled.